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APPELLATE CIVIL.

Before J. W. Neill Esquire, C. S.

Judicial Commissioner, C. P.

Miscellaneous Appeal No. 42* *of* 1891.

Decided on 19th November 1891.

Dalpat Rao and others..... *Plaintiffs.*

Tarachand Marwadi..... *Defendant.*

In a decree for foreclosure of the mortgaged property, if the judgment-debtor dies before the decree was made absolute leaving several representatives, notice should be given to all of them before the decree is made absolute.

[*Supplement to N. S.* 13—1—1892.]

The following are the facts necessary to an understanding of this case. The present Respondent as Plaintiff sued one Nawaz Rao on the 17th December 1889 for foreclosure of a mortgage suit No. 498 of that year and duly obtained a decree on the 18th January 1890 declaring that if the mortgage were not paid off before the 18th July the mortgage should be foreclosed absolutely. Before the mortgage was foreclosed Nawaz Rao died. On an application being made

* This was a miscellaneous appeal from the decision in appeal by the Civil Judge Nagpur. The suit was originally decided by the Extra-Assistant Commissioner Nagpur.

by the mortgagee one Ganpat Rao said to be a son of Nawaz Rao was treated by the Court as representative of Nawaz Rao. He asked for an extension of the time for paying all the debt and on the 29th August the Court granted him 2 months time. The money was not paid and on an application made by the mortgagee the mortgage was on the 10th December 1890 declared foreclosed and a decree absolute drawn up. On the 17th January 1891, the Court apparently gave the decree-holder possession. Thereupon the present Appellants appealed to the Lower Appellate Court against the order of the first Court. They said they were the representatives of Nawaz Rao; they had asked the original Court to be permitted to pay off the mortgage; that the Court was wrong in foreclosing the mortgage without any notice to them and they practically asked the Court to reopen the case.

The Lower Appellate Court has refused on the ground that ample time was given, that one of the Appellants had notice, and that the Transfer of Property Act does not require that notice should issue to the Defendant before a foreclosure decree is made absolute.

It is now urged that Nawaz Rao having died and having left as his representatives the Appellants two sons, two grandsons and his widow, all interested in the property, notice should have been given to all of them before the mortgage decree was made absolute.

On the other side it was maintained that the appeal ought not to lie for it was really an appeal against an order refusing to extend time when an application to extend time had been made before the decree was made absolute. It was not denied that appellants were the representatives of Nawaz Rao but

it was contended that success in the present case could not help as there was another case in which the same property had been decreed to Respondent in foreclosure of mortgage and that the order in that case had not been appealed. The appeallants demurred to this and it is not necessary to consider the other case at all at present.

In the present case I am of opinion that the first court erred in not sending notice to all the representatives of Nawaz Rao. When the latter died there was no decree absolute and the suit had not been concluded. Notice should have been served on his representatives the Appellants. That was not done and I think that the failure to do so vitiates all subsequent proceedings. I shall therefore set aside the orders of the Courts below and direct that if within three months from the present date the Appellants pay the sum decreed by the original Court they shall be held to have redeemed the mortgage. But that if they fail to do so the mortgage shall be absolutely foreclosed. Respondent will pay costs in this and the Lower Appellate Court.

Counsel for Appellant—Messrs. Balwant Rao and P. N. Dutt Advocates.

„ *Respondent—Mr. B. K. Bose Advocate.*

APPELLATE CIVIL.

Before J. W. Neill, *Esquire*, C. S.

Judicial Commissioner, C. P.

Miscellaneous Appeal No. 40* *of* 1891.

Decided on 19*th November* 1891.

Vithoba Laxaman.....*Plaintiff*

Sheoram deceased, heir Jeyram.....*Defendants*

An objection taken by a person being the representative of the judgment-debtor in the course of an execution of a decree to the effect that the property attached is his own property and not held by him as such representative is a matter cognizable only under Section 244 of the Code of Civil Procedure and not the proper subject matter of a separate suit under Sections 280, 281 *and* 283 *of the Civil Procedure Code.*

The appeal in this case raises only a single question of law *viz.* whether an objection taken by a person who has become the representative of the judgment-debtor in the course of the execution of a decree to the effect that the property attached in satisfaction thereof is his own property and not held by him as such representative, is a matter cognizable only under Section 244 of the Code of Civil Procedure and not the proper subject-matter of a separate suit by a party against whom an adverse order may have been passed under Sections 280 and 281 as provided by Section 283.

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* This was a miscellaneous appeal from the decision in appeal by the Civil Judge Nagpur. The suit was originally decided by the Extra-Assistant Commissioner Nagpur.

The appellant represented that a person made a representative of a judgment-debtor might well have a dual character and that he ought to be allowed to file a separate suit to show that property attached in execution of the decree was his own not as representing the judgment-debtor at all.

On the other hand Respondent relied on two Full Bench Rulings, one of the Calcutta High Court, Puncham Bundopadhya and Kameen Sahi *vs.* Rabia Bibi and others I. L. R. Cal. XVII p. 711 and the other of the Allahabad High Court, Seth Chandmal *vs.* Durga Din I. L. R. All. XII p. 313 as settling the matter the other way. The bearings of such a case were carefully examined by the learned Judges in these cases. All precedents were considered and there was no lack of argument but I am of opinion that the decision come to was the only one they could have come to after a proper consideration of the different Sections of the Code of Civil Procedure relating to the execution of decrees. Section 234 distinctly says that when a decree is to be executed against the legal representative of a deceased judgment-debtor 'such representative shall be liable only to the ex-'tent of the property of the deceased which has come 'into his hands and which has not been properly dis-'posed and for the purpose of ascertaining such lia-'bility the Court executing the decree may * * * 'compel the said representative to produce such ac-'counts as it thinks fit.' The Court is to decide what property has come into the hands of the representative and under Section 244 (e) no such question can be determined by separate suit.

I also agree that the wording of Section 280 which must be read with Sections 278 and 279 shows that these Sections will not apply to property attached

[*Supplement to N. S. 20—1—1892.*]

in the possession of the representative of a judgment-debtor and claimed by him as his own and not the property of a third person. For these reasons I think the Lower Appellate Court was right in admitting an appeal in the present case and I dismiss the present appeal with cost.

Counsel for Appellant—Mr. Dillon Barrister-at-law.

" *for Respondent—Mr. B. K. Bose Advocate and Mr. Raoji Kashinath.*

APPELLATE CIVIL.

Before J. W. Neill Esquire, C. S.

Judicial Commissioner, C. P.

Second Appeal No. 382* *of* 1891.

Decided on 25th November 1891.

Anandrao Vinayek..... *Plaintiff.*

Jageshwar Laxman..... *Defendants.*

A creditor is entitled to charge a higher rate of interest than that stipulated for, in case of failure of the debtor to pay strictly in accordance with the agreement only on the ground that the creditor had incurred loss and was in consequence entitled to damages.

The Lower Appellate Court appears to have confused the question of what is a high rate of interest with the question of whether the taking of a higher rate of interest than that agreed on in the event of regular payments not being made is a penalty which can be relieved from in whole or in part.

On this ground the Lower Appellate Court thought the First Court wrong. But the First Court went on the sound principle that the interest stipulated for was what the creditor expected to get, that the higher rate of interest made the consequence of failure to pay strictly in accordance with the agreement was of the nature of a penalty and that a court need only award the higher interest * *

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* This was a second appeal from the decision in appeal by the Commissioner Nagpur Division. The suit was originally decided by the Extra-Assistant Commissioner Nagpur.

if it considered the creditor had incurred loss and was entitled to damages. The Court did not see that the creditor had suffered any loss and the stipulation for higher interest was certainly not of the essence of the real contract.

I think then that the First Court was right. I allow the appeal and reversing the decree of the Lower Appellate Court restore that of the Court of first instance. Respondent will pay costs in this and in the Lower Appellate Court.

Counsel for Appellant—Mr. Balwant Rao Advocate.

Respondent was absent.

APPELLATE CIVIL.

Before J. W. Neill, Esquire, C. S.

Judicial Commissioner, C. P.

Second Appeal No. 428 of 1891.*

Decided on 24th November 1891.

Zalamsing.....Plaintiff.

Balaji and Antu..... Defendants.

[Supplement to N. S. 27—1—1892.]

Where a creditor obtains an instalment bond with a clause that on failure to pay any instalment the entire sum shall become payable at once, he is at liberty to accept payment of overdue instalments and waive his right to claim the entire sum and is not obliged to bring a suit for the entire sum. The acceptance of the overdue instalments, however, will not bar the creditor from claiming the entire sum due on the debtor's failure to pay a subsequent instalment.

The Judge of the Lower Appellate Court has decided this appeal merely on the strength of a decision of the Court which has been most strangely misunderstood. That decision merely affirms that if a creditor has obtained an instalment bond which contains a clause that on the failure to pay any instalment the entire sum shall become payable at once he is at liberty to accept payment of overdue instalments and waive his right to claim the entire sum and is not obliged to bring a suit for the entire sum; the mere act of receiving the overdue instalment being a waiver of his right. It was nowhere affirmed that on a subsequent instalment not being paid the creditor could not claim the entire sum due. The Lower Appellate Court having then decided the appeal under

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* This was a second appeal from the decision in appeal of the Deputy Commissioner Bhandara. The suit was originally decided by the Extra-Assistant Commissioner Bhandara.

an entire misapprehension I remand the case under Section 562 of the Code of Civil Procedure for a fresh decision. Appellant will obtain a refund of stamp duty on his memo of appeal. Other costs will be costs in suit.

Counsel for Appellant—Mr. Dick Barrister-at-law.

„ *Respondent—Mr. B. K. Bose Advocate.*

APPELLATE CIVIL.

Before J. W. Neill Esquire, C. S.

Judicial Commissioner, C. P.

Second Appeal No. 272* *of* 1891.

Decided on 28th November 1891.

Ramchandra and Laxaman.....Plaintiffs.

Mithulal Hemraj (dead), heirs Kesarbai and Salubai..... } *Defendants.*

Where a mortgage by conditional sale made before the passing of the Tenancy Act and is foreclosed after the passing of the Act and the sale made absolute, the value which the Malguzar must pay if he wishes to take the holding is the value that a revenue officer may fix.

The only point argued in this appeal was regarding the price at which the Malguzar should be allowed to take the absolute occupancy holding. I

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* This was a second appeal from the decision in appeal by the Civil Judge Nagpur. The suit was originally decided by the Extra-Assistant Commissioner Nagpur.

have held in the case of Nawab Fouzadar Khan vs. Baldeo Kasiram and in several other cases that where a mortgage by conditional sale made before the passing of the Tenancy Act is foreclosed after the passing of the Act and the sale made absolute, the value which the Malguzar a landlord must pay if he wishes to take the holding is the value that a revenue officer may fix. I must therefore allow the present appeal and amend the decree of the Courts below. Costs will be in proportion to success.

Counsel for Appellant—Mr. P. N. Dutt Advocate.
„ for Respondent—Mr. Balwant Rao Advocate.

APPELLATE CIVIL.

Before J W Neill, Esquire, C. S.

Judicial Commissioner, C P

Second Appeal No 283 of 1891.*

Decided on 1st December 1891

Jagmhan and Jugal Mohan.....Plaintiffs.

Tikaitrai.....Defendant.

After the date fixed for payment the plaintiff can not claim any particular rate of interest but is entitled only to fair interest

Eighteen per cent is not in itself an exorbitant rate of interest in this part of the country and a stipulation that compound interest shall be paid on interest not paid up is not a penalty.

I can allow this appeal on the last ground which

* This was a second appeal from the decision in appeal by the Commissioner Jabalpur Division. The suit was originally decided by the Extra-Assistant Commissioner Damoh.

does not seem to have been pressed in the Lower Appellate Court that after the date fixed for payment the Plaintiff could not claim any particular rate of interest but is entitled only to fair interest. The other grounds of appeal are not valid. Eighteen per cent is not in itself an exorbitant rate of interest in this part of the country and a stipulation that compound interest shall be paid on interest not paid up is not a penalty.

But from the 24th November 1888 up to the institution of the suit the Plaintiff will obtain only simple interest at 12 per cent on the principal sum. The decree of the Lower Appellate Court will be modified accordingly. Costs will be allowed in this Court on the amount reduced. No order in regard to costs in Lower Appellate Court will be made as the actual question of interest raised here was not dismissed there.

Counsel for Appellant—Messrs. Dick and Dillon counsels.

„ *for Respondent—Mr. Balwant Rao Advocate.*

APPELLATE CIVIL.

Before J. W. Neill, Esquire, C. S.

Judicial Commissioner, C. P.

Second Appeal No. 411 of 1891,*

Decided on 25th November 1891.

Punjaji, Gulabrao and Chintaman...Plaintiffs.

Jagannath and Sitaram..... Defendants.

"What is meant by 'the time requisite for obtaining a copy' is the time which it takes an applicant to obtain the copy using all due diligence." Mt. Kaseri Bai vs. Mt. Chandra Bhaga Bai, C. P. Law Reports Vol. IV, page 188, overruled and Upasa vs. Gopala and others, C. P. Law Reports Vol. IV, page 166 followed.

The appeal in this case before the Lower Appellate Court was dismissed as being time barred. It is now argued that the Lower Appellate Court was wrong in not allowing the full time required for obtaining copies of the Judgment and decree.

The Judgment was dated 30th September 1890; the application for copy was made on 22nd October 1890. The copy was ready on the 24th November 1890 and delivered to applicant on 2nd December. The applicant wished to deduct all the time between the application for copy and the date of the delivery to him. On the other hand it was argued that the time up to the 24th November only should be allowed.

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* This was a second appeal from the decision in appeal by the Civil Judge Wardha. The suit was originally decided by the Assistant Commissioner Wardha.

The Judge of the Lower Appellate Court took the latest view and relied on a ruling of this court Mt. Kaveri Bai *vs.* Mt. Chandra Bhagabai *Nyaya Sudha* Report IV 188.

I am not inclined to accept this decision which conflicts with a previous decision of this Court, Upasa *vs.* Gopala and others *Nyaya Sudha* IV 166. I am of opinion that what is meant by 'the time requisite for obtaining a copy is the time which it takes an applicant to obtain the copy using all due diligence. If when an application for obtaining a copy is made the applicant is told to call and take his copy on the 8th day then if he calls and takes it on the 8th day he is entitled to have those 8 days excluded from the time within which he must file his appeal even although the copy may have been ready on the 4th or 6th day. It is the rule here that an applicant for a copy shall be told to come again on the 8th day and if the copy be not then ready then again on the 8th day thereafter and this rule must be borne in mind when deciding what time shall be excluded from the period within which an appeal must be filed.

In the present case however it has been made clear that even making allowance for this rule the appeal would have been barred by some days and it is therefore unnecessary to interfere. The appeal is dismissed with costs.

Counsel for Appellant—Mr. Bapu Rao Dada, Pleader.

for Respondent—Mr. B. K. Bose Advocate.

APPELLATE CIVIL.

Before J. W. Neill, Esquire, C. S.

Judicial Commissioner, C. P.

Miscellaneous Appeal No. 29 of 1891.*

Decided on 6th December 1891.

Sitaram and Mt. Bhagai.....Plaintiffs.

Inkia, Balia and other.....Defendants.

Subject —Hindu Law—Guardian of the minors—custody of minors.—Declaration of guardianship.

In default of the mother or if she is unfit to exercise the trust, his (the minor's) nearest male kinsmen should be appointed guardian, the paternal kindred having that preference over the maternal. Held that the sons of the paternal grand mother by another husband than the grand father of the minor are no relatives at all of the minor.

This is an appeal from an order of the Civil Judge dismissing an application of two minor orphan girls to be declared their guardians and to have the custody of them. The persons opposing the claim were the paternal grand-mother and two sons of hers by another husband than the grand father of the minors. The Civil Judge has decided that according to the view of the law taken in Mr. Mayne's well known book the paternal grand-father has a preference over the maternal relations. What Mr. Mayne however says is this:—

'In default of her (the mother) or if she is unfit 'to exercise the trust, his (the minor's) nearest male

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* This was a miscellaneous appeal from the decision of the Civil Judge Nagpur.

'kinsmen should be appointed the paternal kindred 'having that preference over the maternal.'

Here the *only* male kinsman of the minors (so far as the record shows) is their maternal grandfather, the (sons of the paternal) grand-mother by another husband being no relatives at all. It seems therefore that the Court below decided wrongly according to its own admission as to the law. Both parties rely on the passage from Mr. Mayne's work quoted above and according to it the Plaintiff the maternal grand-father is entitled to the guardianship and custody of the minors. I therefore reverse the order of the Civil Judge and order accordingly.

Counsel for Appellant—Mr. Atmarampant Pleader.

„ *for Respondent—Mr. H. C. Nandan Pleader*

APPELLATE CIVIL.

Before J. W. *Neill, Esquire*, C. S.

Judicial Commissioner, C. P.

Civil Reference No. 107* *of* 1891

Decided on 23*rd August* 1891.

Shrawan.....*Plaintiff.*

Ragho Kunbi.....*Defendant.*

When a district is under Settlement and a Notification under the Land Revenue Act having been issued that a Settlement Officer is to determine whether any particular land is sir *or not, under Sec.* 122 (a) *of the Land Revenue Act, the ordinary Civil Courts are ousted of their jurisdiction in the matter. Held that if in spite of this the Court of an Assistant Commissioner entertained the suit and decided the question that the land is* sir, *the decision will be of a Court not having jurisdiction.*

In the case might have appealed and carried in appeal to the Judicial Commissioner's Court, the Judicial Commissioner will not deal with the case under Sec. 622 *of the Code of Civil Procedure.*

The decision of the Court in this case has been brought to notice by the Deputy Commissioner.

The suit was in reality one to have it determined that a particular field was '*sir*' and that the Plaintiff was consequently entitled to recover possession from the tenant cultivating it.

As the district of Nagpur is under Settlement a Notification under the Land Revenue Act having been issued in November last it was for the Settlement officer to determine whether any particular land is

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* This was a civil reference by the Deputy Commissioner Nagpur.

'*sir*' or not and under Section 152(*a*) of the Land Revenue Act the ordinary Civil Courts, are ousted of their jurisdiction in the matter. In spite of this the Court of the Assistant Commissioner entertained the suit and decided that the land was '*sir*' and that consequently the Plaintiff was entitled to recover possession. There can be no doubt that the Court had no jurisdiction and that the decree is that of a Court not having jurisdiction. All the same as the case was one which might have been appealed and carried in appeal upto this Court I do not think that I am empowered under Section 622 of the Code of Civil Procedure to deal with the case. This is the more to be regretted because the decision of the Judge is wholly wrong-based on a confused notion of what '*sir*' land is and arrived at by defective reasoning. The Deputy Commissioner must call the attention of all Courts subordinate to him to Section 152 of the Land Revenue Act.

—:O:—

Before J. W. Neill, Esquire, C. S.

Judicial Commissioner, C. P.

Second Appeal No. 285 of 1891.*

Decided on 30th November 1891.

Vitoba and Sitaram.....Plaintiffs.

Laxamangir, Dharamgir and Balgir...Defendants.

[Supplement to N. S. 4—1892.]

Subject.—Malguzar and lessee—Proprietary rights at Settlement.. Gosains—Joint family among Gosains. Guru's power to alienate—Chela's consent unnecessary. Fraud. Burden of proof.

In the province of Nagpur a Malguzar was synonymous with a lessee, and leases were given for short periods, the rights of a lessee did not extend beyond his lease, and he could not claim a renewal.

When at settlement proprietary rights were conferred on a party R who had been recorded Malguzar on the death of the late Malguzar S, mainly because of what he (R) had done for the village—held that thereby R acquired the proprietary right. The property thus obtained was purely self acquired.

Joint families are not found amongst Gosains, among whom the family system does not exist.

Held that a Guru can alienate his property without his Chela's consent. In the absence of law or custom, there is no reason why the power of Guru should be restricted.

It is for the party who pleads fraud to prove it or to make a very strong prima facie case before the onus can be shifted.

In the present appeal the learned counsel for Appellant again raises the point taken in the Courts below and decided there in the negative that there were proprietary rights in Malguzari villages in the Nagpur Province before those rights were conferred or created by the British Government. The learned counsel has however not been able to support his contention. A Malguzar was synonymous with a lessee and leases were given for short periods. The rights of a lessee did not extend beyond his lease and

he could not claim a renewal. Such is the account given by all 'authority' and by history regarding the tenure of land in the Nagpur Province, that certain rights in land of a proprietary nature may have existed need not be decided but a Malguzari tenure of a village did not involve any such right and in the present case we have only to deal with the Malguzari tenure the system under which a village was leased for a short period. Nor is there anything in the present case to show that the lease was held for generations in any particular family. Another objection taken by the learned counsel for Appellant to the judgment of the Courts below is in regard to their finding the village of Jadgaon was the self-acquired property of one Rupgir. It appears that he was the Chela of one Sheoramgir who had been Malguzar of this village and that on Sheoramgir's death the authorities had made him Malguzar. At Settlement proprietary rights were conferred on him mainly it was said because of what he had done for the village. I can not think the Courts were wrong in holding that thereby Rupgir acquired the proprietary right. It was not owing to Sheoramgir but owing to his then position and personal exertions that proprietary was conferred on him. The property thus obtained was surely self-acquired.

A third objection as to the Courts having omitted to find whether Rupgir was joint with Sheoramgir his Guru at the time of the death of the latter appears to me to be a little act of the way. Joint families are not found amongst Gosains among whom the family system does not exist and the objection is a little far fetched.

* This was a second appeal from the decision in appeal by the Civil Judge Wardha. The suit was originally decided by the Extra-Assistant Commissioner Wardha.

Another objection that a Guru can not alienate his property without his Chela's consent is one which is not deserving either of much consideration. No law or custom to that effect has been quoted or proved and in the absence of any thing of the kind there is no reason why the power of the Guru should be restricted.

The last objection is that the Courts should not have thrown the onus of proving that the transfer by Rupgir to Plaintiff was fraudulent on the Defendant. It is however for the party who pleads fraud to prove it or to make out a very strong *prima facie* case before the onus can be shifted. The Defendants did not make out any such case.

I am therefore of opinion that the decision of the Courts below is perfectly right and I dismiss the present appeal with costs.

Counsel for Appellant—Mr. C. V. Naidu Barrister-at-law.

„ *for Respondent—Mr. B. K. Bose Advocate.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.,

Officiating Judicial Commissioner, C. P.

Second Appeal No. 405 of 1891.*

Decided on 25th January 1892.

Huratsing Lachmansing .... Plaintiff.

Baktawarsing, Dalzanjansing and others ...Defendants.

Subject.—Interest after due date. Sec. 111 of the Civil Procedure. Set off.

Interest by way of damages after the expiry of the mortgage can not be added to the mortgage in a suit for foreclosure and in the circumstances of this case no interest by way of damages ought to be awarded. I. L. R. 13 All. 231 and I. L. R XIX Cal p. 20 followed.

It is not equitable to refuse to take into account profits of St. 1943 which it is contended could not be set off as a claim for them would be barred by limitation because the profits do not appear to have been treated as a set off but they were reckoned in taking the account between the parties. Profits had accrued while the property was in the possession of the mortgagee though when holding over after the expiry of the lease.

The only points with which I have to deal are the refusal by the Courts below to allow interest by way of damages after the expiry of the mortgage and the setting off against the claim of the Plaintiff Appellant of the profits for 1943 St., which, it is contended, could not be set off, as a claim for them would have been barred by limitation.

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* This was a second appeal from the decision in appeal of the Commissioner Nerbada Division. The suit was originally decided by the Extra-Assistant Commissioner Hoshangabad.

Under the rulings in I. L. R. 13 All. p. 331 and I. L. R. 19 Cal. p. 20, the interest claimed could certainly not be added to the mortgage money in a suit for foreclosure and in any case in the circumstances of this case I should hold that no interest by way of damages ought to to be awarded.

As regards the other question the profits for St. 1943 do not appear to have been treated as a set off under Section 111 Code of Civil Procedure, but to have been reckoned in taking the accounts between the parties. I think that it would not have been equitable to refuse to take them into account, as they accrued while the property was in the possession of the mortgagee, though when holding over after the expiry of the lease.

The appeal is dismissed with costs.

[Supplement to N. S. 9—3—1892.]

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Civil Reference No. 141* *of* 1891.

Decided on 26th January 1892.

Gulabsa 'Padamsa.....Plaintiff.

Amra.....Defendant.

An instalment bond is either a simple instalment bond, without any provision as to the exigibility of the whole of the amount in case of default, in which case it comes under Article 74 of the Indian Limitation Act; or else it is an instalment bond containing such a provision and in that case it comes under Article 75 of the same Act. Article 75 contemplates a suit for the whole amount of the bond and not for whatever balance may remain after the deduction of certain instalments as to which default may have been made. The provision of the article as to waiver is certainly meant to extend the period of limitation.

I have to consider the case of an instalment bond containing a provision that the whole amount should be exigible on default being made to pay, not one, but two instalments Default was made in respect of the first two instalments. A suit was afterwards brought for the whole of the money due on the bond. The question is when the period of limitation began to run. If the provision in the bond had been that the whole amount should be eligible if default were made in any one instalment, the case would be perfectly clear. The period would according to Article 75 Schedule II Act XV of 1877 begin to run from the date when the first default was made, or suppos-

* This was a Civil reference by the Deputy Commissioner Naimar.

ing the payee to waive the benefit of the provision, the period would according to that Article begin to run from the date of the next default in which there should be no waiver. If I am right in understanding the Deputy Commissioner's opinion to be that the periods specified in the third column of the Schedule against Article 75 are intended merely to show when the whole amount becomes exigible, I have no doubt that the opinion is correct. The heading of the column shows clearly that what is shown in it is the time from which the period of limitation specified in next preceding column begins to run. I think that the Deputy Commissioner is wrong in thinking that Articles 74 and 75 are to be read together in respect of the same bond. Either an instalment bond is a simple instalment bond without any provision as to the exigibility of the whole of the amount in case of default, in which case it comes under Article 74, or else it is an instalment bond containing such a provision and in that case it comes under Article 75. Article 75 seems to me to clearly contemplate a suit for the whole amount of the bond and not for whatever balance may remain after the deduction of certain instalments as to which default may have been made. The provision of the Article as to waiver is certainly meant to extend the period of limitation. As I have said, in the present case the only difficulty seems to me to arise from the fact that according to the provision in the bond the default which renders the whole amount exigible is not the first, but the second. The only way to deal with the matter is, I think, to apply the principle of Article 75, which I take to be that the period of limitation runs from the time when the whole amount becomes exigible, that is in the present case from the date of the second default. In this view the suit was not barred by limitation as regards the first instalment.

APPELLATE CIVIL.

Before J. W. Neill, Esquire, C. S.

Judicial Commissioner, C. P.

Second Appeal No. 29* *of* 1891.

Decided on 8th August 1891.

Nowrojee Jamsetjee and others .....*Plaintiffs.*

Hormusjee.....*Defendant.*

[Supplement to N. S. 23—3—1892.]

When a party agrees to deliver 500 *tons of firewood a certain place on a certain day, he must prove that he had that quantity of firewood ready for delivery at that place on that day. A finding that he had not that quantity ready at the time and the place agreed upon is fatal to his case or claim.*

JUDGMENT.—The case was remanded in order that plaintiff might prove that on the 31st March, he had 500 tons of firewood ready for delivery at Harsood. The Court has, after taking evidence, recorded that the evidence does not suffice to prove that so much wood was ready for delivery, and the Court distrusts the evidence of the witnesses. It is urged that the finding is against the evidence, but I cannot say that. The Court has pointed out why it districts the witnesses and if their evidence is not believed, the issue has not been proved.

I do not see how I can well go against the finding of the Court, and, as it is fatal to the Plaintiff's case, I must dismiss the appeal with costs.

Counsel for Paintifs—Mr. Balvant Rao Advocate.
„ for Defendants—Mr. Bipin Krishna Bose Advocate.

* This was a second appeal from the appellate decision of the Deputy Commissioner Nimar reversing the decree of the Junior Extra-Assistant Commissioner Khandwa.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 292 of 1891.*

Decided on 21st January 1892.

Mt. Kundan, Tulsiram, Umraosingh and Kashiram ..... } *Plfs. Appellants.*

Thakur Lall and Lachman Prasad...Defts, Respondents.

The rights of redemption and rights of foreclosure are co-extensive. If the full amount of the debt has been satisfied from the usufruct of the property, mortgagors have a right to redeem at once under Section 62 of Transfer of Property Act.

This was a suit for the redemption of mortgaged property in the possession of the mortgagees on the allegation that the mortgage debt had been more than satisfied from the usufruct of the mortgaged property. It was denied by the mortgagees that in fact the debt had been satisfied and it was pleaded that the suit was premature as having been instituted before the date fixed in the mortgage deed for the payment of the debt.

The Court of first instance fixed several issues, the first of which was, "Is the suit for redemption premature?" That issue was tried first and was decided against the Plaintiffs, now Appellants. The suit was accordingly dismissed without taking evidence or trying the remaining issues.

On appeal the Lower Appellate Court affirmed the judgment of the Court of first instance.

The Lower Court have proceeded upon the principle that the right of redemption and the right of foreclosure are co-extensive in the absence of any stipulation express or implied to the contrary and that when a date is fixed for payment the mortgagor is not at liberty to insist on redemption before the expiry of the period named. Applying that principle to the present case, they have held that there is nothing in the mortgage deed now in question to indicate that there was any intention of the parties that redemption should be had before the date fixed.

As to the general principle on which the Courts below have proceeded there are conflicting rulings of the different High Courts, the High Courts of Madras and Allahabad having declared against it, while it has been affirmed by the High Court of Bombay and it has been recognized more than once by this Court.

It seems to me that in this case, as in most cases of the kind, every thing turns on the constructions of the mortgage deed. The deed recites that the debt due by the mortgagors is Rs. 11851 which is to bear interest at 12 annas *per cent per mensem*. To secure this debt they mortgaged to the mortgagees certain landed property which is described in full. The mortgagors are to hold 86¾ bighas of the land rent free for cultivation and are also to occupy the dwelling house, with these exceptions the property is to remain in the possession and enjoyment of the mortgagees on the following terms, from the gross realisations will be deducted first the village expenses, secondly the Government revenue and thirdly a sum of Rs. 96 to be allowed to the mortgagees for their pains in managing the property, the balance is to be applied first to the payment of the interest on the debt if there is a surplus after payment of the interest it is to be

applied to paying off the principal if there is a deficit the amount of interest remaining due is to be added to the principal and to be subject to the same interest as the principal loss arising from irrecoverable arrears of rent due by tenants is to be borne by the mortgagors, the mortgagees are to furnish the mortgagors annually with accounts of their receipts and the mortgagors are to accept those accounts without questioning. Then follows a clause of which the following is a literal translation. "The fixed time (*karar*) for paying the money is the 15th of Jeth Sudi 1950 Sambat having paid in a lump sum whatever balance of money may be found due to you we shall redeem the mortgaged property from mortgage and shall take it from your possession." The mortgagors then covenant that if they shall not pay off the whole debt on the date fixed the whole of the mortgaged property shall on the following day be deemed to have been conveyed to the mortgagees by sale and that the mortgage deed shall be deemed to be a deed of sale. There is nothing else in the deed of any importance for our present purposes. The Court of first instance says:—"According to clauses (*c*) and (*d*) Section 56 Act IV of 1882 the mortgage in suit seems to me to be a usufructuary mortgage as well as a mortgage by conditional sale and not a mere usufructuary mortgage to be dealt with under Section 62 of the said Act. Section 62 also seems to deal with usufructuary mortgages where no period for repayment has been fixed. It is a combination of two mortgages and the rights and liabilities thereunder can be determined by (1) the terms of the contract and (2) local usage if any according to Section 98 of the said Act." The Civil Judge goes on to observe that as no local usage has been pleaded recourse must be had to "the terms of the contract and the provisions of the law." He says that the deed contains nothing to permit the

mortgagors to redeem the property before the date fixed for the payment of the debt and further on he remarks that had the parties intended that the property should be redeemed before the time fixed a stipulation might easily have been inserted to that effect. On the question of law he refers to Section 60 of the Transfer of Property Act and to certain rulings.

No doubt the Civil Judge is right in holding that the deed is partly a usufructuary mortgage and partly a mortgage by conditional sale but he is wrong in concluding that it is therefore an anomalous mortgage coming within the view of Section 98 of the Transfer of Property Act. That section deals with "the case of a mortgage not being a simple mortgage a mortgage by conditional sale a usufructuary mortgage or an English mortgage or a combination of the first and third or the second and third of those forms." Now the present is a combination of the second and third of those forms and is therefore not an anomalous mortgage.

[Supplement to N. S. 30—3—1892.]

It is important to observe with reference to the rulings cited not only what the mortgage now in question is but what it is not. It is not a mortgage with a stipulation that the interest only is to be paid from the usufruct of the property. It is not a mortgage with a stipulation that either the interest or the principal or both are to be deemed to have been satisfied by the usufruct of the property for a certain period. It is not a mortgage by which the usufruct of the property is given to the mortgagee for a certain period on a calculation that by the expiry of that period the whole of the debt will have been satisfied by the usufruct. The parties seem to have been altogether uncertain as to what was likely to happen. If the profits were more than was required to pay the

interest they were to be applied to paying off the principal, if they were less the deficit was to be added to the principal, but in any case the whole amount of the debt must be liquidated on the date fixed or the property would pass absolutely to the mortgagees. Taking the deed as it stands I think it is perfectly clear that the parties never contemplated the contingency of the debt being paid off by the usufruct before the date fixed and the mortgagees continuing nevertheless to remain in possession until that date for we may be quite sure that in such a case there would have been a stipulation for the refund of the excess amount with interest. It seems simply to have been taken for granted that in all probability the debt would not be paid off by the usufruct by the date fixed and that there would remain a balance then to be paid in a lump sum. It would plainly not be in accordance with the intention of the parties that the mortgagees should continue to receive and appropriate the profits of the mortgaged property after the mortgage debt should have been satisfied and it would I think be very hard and inequitable that the Courts should by their construction of the deed bring about such a result. I think that the only way to prevent such a state of thing is to construe the deed as if it were a simple usufructuary mortgage up to the date fixed for payment or in other words as if the date of payment were fixed only conditionally in case the debt should not sooner have been satisfied by the usufruct of the property, and in that view it would be governed by Section 62 of the Transfer of Property Act. Whatever view may be taken of the general principle of the co-extensiveness of the rights of redemption and foreclosure if the full amount of the debt has been satisfied from the rents and profits of the property the mortgagors have a right to redeem at once under that section. As regards that general principle however

I am not prepared to depart from the current of rulings of this Court, which I believe to be in entire accordance with the provisions of the Transfer of Property Act.

In this view I think that the question whether or not this suit is premature depends on the question whether or not the whole mortgage debt has been satisfied as the plaintiffs now appellants, allege. If it has been satisfied from the rents and profits of the property the Plaintiffs Appellants have a right to redeem at once. If on the other hand it has not been so satisfied, their right to redeem has not accrued under either the provisions of Section 62 or the provisions of Section 60 of the Transfer of Property Act for under the latter section the right accrues after the principal money has become payable. "It is necessary therefore that the issues of fact be tried. If the Plaintiffs succeed on the second issue they are entitled to a decree for redemption. If that issue is decided against them their suit fails altogether. I therefore set aside the decrees of the Courts below and I remand the case to the Court of first instance with directions to readmit the suit under its original number in the register and proceed to determine the suit on its merits with reference to the judgment of this Court. The costs of this appeal and of the Lower Appellate Court will follow the result of that determination.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 351 of 1891.*

Decided on 23rd January 1892.

Mt. Juarkuar..... Plaintiff.

Maganraj..... Defendant.

** A deed was executed by a young parda nishin woman adverse to her own interest in favour of a person who was the brother of her deceased husband and was living in the same house with her. It was held that in such a case it is not enough to ascertain that the executant executed the deed voluntarily or that she knew what were the contents or even the full legal effect of it. It should be seen whether the transaction was a fair and equitable one and that she acted with an intelligent appreciation of her own interest and not merely with a view to the interest of the person in whose favour the document was executed.*

[Supplement to N. S. 6—4—1892.]

It would seem that the Courts below were scarcely aware of the principles on which cases of this kind are to be decided and that they treated this case very much as if it had been one in which a man of mature age and versed in business had denied the execution of a deed which he now considered adverse to his interest. The Plaintiff at the time of executing the deed appears to have been very young; she was a *parda nishin* woman; she was living in the same house as the person in whose favour she executed it, and that person was the brother of her deceased husband. The principles on which a transaction entered into

* This was a second appeal from the decision in appeal by the Commissioner Nagpur Division. The suit was originally decided by the Deputy Commissioner Balaghat.

in such circumstances are to be inquired into and adjudicated upon are laid down in 3 C. P. Law Reports 118, in the case ruling in I. L. R. 8 All. 267 referred to in that case, and in some other cases cited in the Allahabad ruling. It is not enough to ascertain that the executant executed the deed voluntarily in the sense that she was not acting under coercion or that she knew what were the contents or even the full legal effect of it. It should be seen whether the transaction was a fair and equitable one and whether there was any security, as in the presence of a competent and disinterested adviser, that she acted with an intelligent appreciation of her own interest and not merely with a view to the interest of the person in whose favour the document was executed.

The case is remanded for further evidence on these points:—

Was the transaction a fair and equitable one?

Was the Plaintiff fully aware of the effect of the transaction?

Did she act under any independent and disinterested advice?

The findings together with the evidence should be submitted to this Court within six weeks of this date. Seven days will be allowed for the parties to present any objection that they may have to the finding.

Counsel for Appellant—Messrs. B. K. Bose and Balwant Rao Advocates.

" *for Respondent—Mr. Dillon Barrister-at-law.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 425 of 1891.*

Decided on 4th February 1892.

Sheoram (dead), heir Sital and Jairam...Plaintiffs.

Khetri, Tukaram, Rajaram and others...Defendants.

Under the Hindu Law a separated brother of the whole blood would be excluded by a reunited brother of the whole blood and so the separated sons are excluded by the sons of the reunited son.

The Lower Appellate Court held on the findings that a father and his three sons separated, and that one of his sons reunited with him and afterwards predeceased him, leaving four minor sons. On the death of the father the separated sons were excluded from inheritance by the sons of the reunited son.

It has been contended in this appeal that the grand-sons could not reunite with their grand-father as they had not separated from him and that even if they could as the succession in a reunited family differs from that in an undivided family, the grand-sons would not inherit to the exclusion of the separated sons.

The first argument seems scarcely to need serious notice. The allegation in the present case is not that the grand-sons reunited with their grand-father but

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* This was a second appeal from the decision in appeal by the Deputy Commissioner Balaghat. The suit was originally decided by the Extra-Assistant Commissioner Balaghat.

that the reunion was effected by their father, so that the condition was literally fulfilled that the persons reuniting should be those who had separated.

There appear to be no precedents exactly applicable to the present case and no distinct authority has been cited in support of the proposition that the separated sons would be entitled to succeed to their father's estate with the reunited son.

Reference has been made to paras 542 and 543 of Mr. Mayne's Treatise on Hindu Law and usage and to book II Chapter 9 of the Mitakshara, which is referred to by Mr. Mayne, but they do not seem to me even indirectly to support the proposition which has been advanced. They lay down and expound the exceptional rule of succession after reunion that a reunited half-brother takes with a separated brother of the full blood. This rule is evidently against the general principle of survivorship which governs the Mitakshara system and an attempt to explain it is noticed by Mr. Mayne in his para 543. The rule seems to me to rest on no logical principle, but merely embody a sort of compromise between the preference that the reunited half-brother would have by reason of re-union and the preference that the separated full brother would have by reason of his being a brother of the whole blood. It seems however to be perfectly clear that a separated brother of the whole blood would be excluded by a reunited brother of the whole blood and so in the present case the separated sons are excluded by the sons of the reunited son. I think, then, that the Plaintiffs Appellants, who are the separated sons, have no case.

It has been contended that if the point of law were decided against the Appellants, the case would

have to go back to the Lower Appellate Court for a finding as to the fact of reunion. No objection was taken in the Memorandum of second appeal to the omission of the Lower Appellate Court to record an express finding on that fact, which appears to have been undisputed at the original trial. It would appear as if the objectoin that reunion had not been proved had not been pressed before the Lower Appellate Court and I think that the finding which the judgment of that Court implies may be taken as sufficient in the circumstances of the case.

The appeal is dismissed with costs.

Counsel for Appellant—Mr. Balwant Rao Advocate.

" *for Respondent—Mr. B. K. Bose Advocate.*

[Supplement to N. S. 13—4—1892.]

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S

Officiating Judicial Commissioner, C. P.

Second Appeal No 453 of 1891.*

Decided on 4th February 1892

Rodee.....Plaintiff.

Ganpati, Suryabhan, Baliram and Govinda ...*Defendants*

In cases in which proprietary rights are conferred on a father at the Settlement, the only way in which the sons could claim would be by showing that they were entitled to interest in the property of the same nature as those upon consideration of which the grant was made and even then they could not claim a share under the Hindu Law but only such right as the Court might deem just The period of limitation in such cases is 6 years in accordance with Article 127 of the second Schedule of the Limitation Act Article 127 does not apply in such cases.

The Respondent has obtained from the Courts below a decree against the sons of his father's brother for a half share in what has been held to be the joint ancestral share of Sonora and Akarur and in *Wahit-malik* held No. 95, which has also been held to be joint ancestral property.

It is admitted that at the Settlement which took place in 1863, the proprietary right in the property in dispute was conferred on the father of the Defendants Appellants. It is stated that the Plaintiff's father was then dead and that the Plaintiff was a child of 3 or 4 years, so that he was unable to claim his rights. The Plaintiff's case is that though neither

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* This was a second appeal from the decision in appeal by the Deputy Commissioner Wardha The suit was originally decided by the Extra-Assistant Commissioner Wardha

the Defendants nor their father ever gave him accounts of the profits of the share of the village, they gave him a one-half share of the produce of field No. 95 up to the year 1290 F., or 1880, A. D., since when they have refused to do so. The Lower Appellate Court finds that it is not proved that in fact they gave him a share of the produce of field No. 95 up to the year 1290 F., or that he had any share in the profits of the village, except by holding rent free a field No. 14, of which he is in possession, including a participation in the fruit of the mango trees thereon. "These are rights" says the Lower Appellate Court, "which the Defendants and their father seem to have kept Plaintiff out of." The Lower Appellate Court finds, however, that there is no proof of any denial of the Plaintiff's title by the Defendants before the 20th September 1879, when he had claimed to be recognised as a co-sharer in the course of mutation proceedings which took place on the death of the father of the Defendants. It held, therefore, that as the plaint in the present case was filed on the 18th July 1890, that is within 12 years of the denial, the suit was not barred by limitation, apparently considering Article 127 of the second Schedule of the Limitation Act 1877 applicable. The finding of the Lower Appellate Court, as I have said, is that the Plaintiff was with one exception "kept out of his rights" by the Defendants and their father all along so that it is impossible to believe that he could have been unaware of his exclusion from the property until the formal denial of his rights in the mutation proceeding and under Article 127 the period of limitation begins to run from the time when the exclusion becomes known to the Plaintiff. The Plaintiff did not himself give evidence in this case, though it was a case in which it was particularly incumbent upon him to do so. It appears, then, that the suit is not shown to have been in time even according to Article 127.

It has been argued in this Court, however, that the suit would not lie under that Article at all and that in accordance with the rulings published in 3 C. P. Law Reports 105 and 109 in as much as the proprietary right was conferred at the Settlement upon the Plaintiff's uncle, the Plaintiff could only sue under Section 88 of Act XVIII of 1881. In the first of those cases it was held that where proprietary rights had been conferred on a father at the Settlement the only way in which the sons could claim would be by showing that they were entitled to interests in the property of the same nature as those upon consideration of which the award was made and even then they could not claim a share under the Hindu Law, but only such right as the Court might deem just. I think that that ruling applies to the present case and that the Plaintiff had to sue under Section 88 of the Land Revenue Act. Apparently the period of limitation in such cases is 6 years in accordance with Article 120 of the second Schedule of the Limitation Act. If the Plaintiff was 3 years old at the time of the Settlement he attained his majority in 1878; if he was 4 years old, he became of full age in 1877. If he be allowed six years from either of those years, the present suit is long out of time. I think then, that the decrees of the Courts below must be set aside.

In this view it is not necessary to decide the other point which has been argued, whether the Lower Courts were right in laying the burden of proving the separation of the family on the Defendants Appellants.

The appeal is allowed. The decrees of the Lower Courts are set aside with costs.

Counsel for Appellant—Mr. Fraser Barrister-at-law.

" *for Respondent—Mr. P. N. Dutt Advocate.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 292 of 1891.*

Decided on 21st January 1892

Mt. Kundan, Tulsiram, Umraosing and Kashiram ...*Plaintiffs.*

Thakurlal, and Lachmanprasad .....*Defendants.*

[Supplement to N. S. 20—4—1892.]

A deed of mortgage provided that the mortgage debt was to carry interest at a certain rate, that the mortgagee was to remain in possession of the mortgaged estate and apply the net profits, first towards the interest, and the balance, if any, towards the principal, and that the debt was to be repaid after a certain number of years. The parties did not contemplate the contingency of the debt being paid off by the usufruct before the stipulated period, and there was no provision for redemption at any earlier date in the event of such a contingency happening.

Held that notwithstanding the absence of any express provision to that effect, the mortgagor would be entitled to redeem before the date fixed, on his showing that the debt had been wholly discharged by the usufruct. He could not, however, claim to redeem if such a discharge has not taken place, by payment of such amount as might, on an account being taken, be found due. In that case the mortgagee would be entitled to remain in possession until the expiry of the stipulated period.

This was a suit for the redemption of mortgaged property in the possession of the mortgagees on the allegation that the mortgage-debt had been more than

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* This was a second appeal from the decision in appeal by the Commissioner Nerbada Division. The suit was originally decided by the Civil Judge Hoshangabad.

satisfied from the usufruct of the mortgaged property. It was denied by the mortgagees that in fact the debt had been satisfied and it was pleaded that the suit was premature as having been instituted before the date fixed in the mortgage-deed for the payment of the debt.

The Court of first instance fixed several issues, the first of which was. "Is the suit for redemption premature"? That issue was tried first and was decided against the Plaintiffs, now Appellants. The suit was accordingly dismissed without taking evidence or trying the remaining issues.

On appeal the Lower Appellate Court affirmed the judgment of the Court of first instance.

The Lower Courts have proceeded upon the principle that the right of redemption and the right of foreclosure are co-extensive in the absence of any stipulation express or implied to the contrary and that when a date is fixed for payment, the mortgagor is not at liberty to insist on redemption before the expiry of the period named. Applying that principle to the present case, they have held that there is nothing in the mortgage-deed now in question to indicate that there was any intention of the parties that redemption should be had before the date fixed. As to the general principle on which the Courts below have proceeded there are conflicting rulings of the different High Courts, the High Courts of Madras and Allahabad having declared against it, while it has been affirmed by the High Court of Bombay and it has been recognised more than once by this Court.

It seems to me that in this case, as in most cases of the kind, every thing turns on the construction of the mortgage-deed.

The deed recites that the debt due by the mortgagors is Rs. 11,85½, which is to bear interest at 12 annas *per cent per mensem*. To secure this debt they mortgage to the mortgagees certain landed property which is described in full. The mortgagors are to hold 86¾ *bighas* of the land rent free for cultivation and are also to occupy the dwelling-house. With these exceptions the property is to remain in the possession and enjoyment of the mortgagees on the following terms:—from the gross realizations will be deducted 1st the village expenses; 2ndly the Government Revenue and 3rdly a sum of Rs. 96 to be allowed to the mortgagees for their pains in managing the property; the balance is to be applied first to the payment of the interest on the debt, if there is a surplus after payment of the interest, it is to be applied to paying off the principal; if there is a deficit, the amount of interest remaining due is to be added to the principal and to be subject to the same interest as the principal; loss arising from irrecoverable arrears of rent due by tenants is to be borne by the mortgagors; the mortgagees are to furnish the mortgagors annually with accounts of their receipts and the mortgagors are to accept those documents without questioning. Then follows a clause of which the following is a literal translation. "The fixed time (karar) for paying the money is the 15th of Jeth Sudi 1950 Sambat; having paid in a lump sum whatever balance of money may be found due to you, we shall redeem the mortgaged property from mortgage and shall take it from your possession." The mortgagors then covenant that if they shall not pay off the whole debt on the date fixed, the whole of the mortgaged property shall on the following day be deemed to have been conveyed to the mortgagees by sale and that the mortgage-deed shall be deemed to be a deed of sale. There is nothing else in the deed of any importance for our present purposes.

The Court of first instance says:—"According to clauses (c) and (d) Section 58 Act IV of 1882 the mortgage in suit seems to me to be a usufructuary mortgage as well as a mortgage by conditional sale and not a mere usufructuary mortgage to be dealt with under Section 62 of the said Act. Section 62 also seems to deal with usufructuary mortgages, where no period for repayment has been fixed. It is a combination of two mortgages and the rights and liabilities thereunder can be determined by (1) the terms of the contract and (2) local usage, if any, according to Section 98 of the said Act." The Civil Judge goes on to observe that as no local usage has been pleaded, recourse must be had to "the terms of the contract and the provisions of the law." He says that the deed contains nothing to permit the mortgagors to redeem the property before the date fixed for the payment of the debt and further on he remarks that had the parties intended that the property should be redeemed before the time fixed, a stipulation might easily have been inserted to that effect. On the question of law he refers to Section 60 of the Transfer of Property Act and to certain rulings.

No doubt the Civil Judge is right in holding that the deed is partly an usufructuary mortgage and partly a mortgage by conditional sale; but he is wrong in concluding that it is therefore an anomalous mortgage, coming within the view of Section 98 of the Transfer of Property Act. That Section deals with "the case of a mortgage *not* being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, or an English mortgage, or a combination of the first and third or the second and third of those forms." Now the present is a combination of the second and third of those forms and is therefore not an anomalous mortgage.

It is important to observe with reference to the rulings cited, not only what the mortgage now in question is, but what it is not. It is not a mortgage with a stipulation that the interest only is to be paid from the usufruct of the property. It is not a mortgage with a stipulation that either the interest or the principal or both are to be deemed to have been satisfied by the usufruct of the property for a certain period. It is not a mortgage by which the usufruct of the property is given to the mortgagee for a certain period on a calculation that by the expiry of that period the whole of the debt will have been satisfied by the usufruct. The parties seem to have been altogether uncertain as to what was likely to happen. If the profits were more than was required to pay the interest, they were to be applied to paying off the principal, if they were less the deficit was to be added to the principal; but in any case the whole amount of the debt must be liquidated on the date fixed, or the property would pass absolutely to the mortgagees. Taking the deed as it stands, I think it is perfectly clear that the parties never contemplated the contingency of the debt being paid off by the usufruct before the date fixed and the mortgagees continuing nevertheless to remain in possession until that date, for we may be quite sure that in such a case there would have been a stipulation for the refund of the excess amount with interest. It seems simply to have been taken for granted that in all probability the debt would not be paid off by the usufruct by the date fixed and that there would remain a balance then to be paid in a lump sum. It would plainly not be in accordance with the intention of the parties that the mortgagees should continue to receive and appropriate the profits of the mortgaged property after the mortgage debt should have been satisfied and it would, I think, be very hard and inequitable that the Courts

[Supplement to N. S. 27—4—1892.]

should by their construction of the deed bring about such a result. I think that the only way to prevent such a state of things is to construe the deed as if it were a simple usufructuary mortgage up to the date fixed for payment, or in other words as if the date of payment were fixed only conditionally in case the debt should not sooner have been satisfied by the usufruct of the property, and in that view it would be governed by Section 62 of the Transfer of Property Act. Whatever view may be taken of the general principle of the co-extensiveness of the rights of redemption and foreclosure, if the full amount of the debt has been satisfied from the rents and profits of the property, the mortgagors have a right to redeem at once under that section. As regards that general principle, however, I am not prepared to depart from the current of rulings of this Court, which I believe to be in entire accordance with the provisions of the Transfer of Property Act.

In this view I think that the question whether or not this suit is premature depends on the question whether or not the whole mortgage debt has been satisfied, as the Plaintiffs now appellants allege. If it has been satisfied from the rents and profits of the property the Plaintiffs appellants have a right to redeem at once. If, on the other hand, it has not been so satisfied, their right to redeem has not accrued under either the provisions of Section 62 or the provisions of Section 60 of the Transfer of Property Act for [illegible] the latter section a right accrues "after the principal [illegible] become payable." It is necessary, therefore, that the issues of fact be tried. If the Plaintiffs succeed on the 2nd issue they are entitled to a decree for redemption. If that issue is decided against them, their suit fails altogether.

I therefore set aside the decrees of the Courts below and I remand the case to the Court of first instance with directions to readmit the suit under its original number in the registrar and proceed to determine the suit on its merits with reference to the Judgment of this Court. The costs of this appeal and of the Lower appellate Court will fallow the result of that determination.

Counsel for Appellant—Mr. Balwant Rao Advocate.

„ *for Respondent—Mr. B. K. Bose Advocate.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 444 of 1891.*

Decided on 4th February 1892.

Tarachand Mokkumchand ..... *Plaintiffs,*

Sambha and Sheoram ..... *Defendants.*

In the case of an out and out transfer of a holding by a tenant, when the suit is between the landlord on the one side and the stranger transferee of the tenant's right on the other, the landlord is entitled to possession, whereas in a case in which the original tenant is a party, he could not re-enter on the holding.

I think that this case is governed by the ruling

* This was a second appeal from the decision in appeal by the Deputy Commissioner Chindwara, the suit was originally decided by the Assistant Commissioner Chindwara.

of this Court reported in 3 C. P. L. R. 9 and that in accordance with that ruling the Court of first instance rightly held that the landlord was entitled to have the transfer of the tenant's right declared to be void as against him, but could not re-enter on the holding. The case reported in 4 C. P. L. R. 172 has been quoted as authority for the proposition that where there has been an out and out transfer the landlord is entitled to possession. There is, however, this important distinction between that case and the present one, that in that case the contention was only between the landlord on the one side and the stranger transferee of the tenant's right on the other, whereas in the present case the original tenant is a party.

The appeal is allowed with Costs in this Court and that of the L. A. Court. The decree of the L. A. Court is set aside and that of the first Court is restored.

Counsel for Appellant—Mr. C. V. Naidu Barrister-at-law.

" *for Respondent—Mr. B. K. Bose Advocate.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 483 of 1891.*

Decided on 8th February 1892.

Rajasing Zamidar..... Plaintiff.

Jhingrao Teli..... Defendant.

* *A suit can not be brought for a declaration in anticipation of possible future litigation, under Section 42 of the Specific Relief Act 1877.*

The facts found by the Lower Appellate Court are that the Defendant Appellant who was a lessee of a village under the Malguzar, the Plaintiff Respondent, dug a tank without the permission of the Malguzar. The Lower Appellate Court has given the Plaintiff Respondent a declaratory decree declaring that the Defendant Appellant has excavated the tank without his consent and can therefore claim no consequential rights to the village on account of such construction.

Presumably this decree was passed under Section 42 of the Specific Relief Act 1877; but it is difficult to see how such a declaration as that which has been made can be brought within the terms of that Section. It appears to me that this case is governed by

* This was a second appeal from the decision in appeal by the Deputy Commissioner Raipur. The suit was originally decided by the Extra-Assistant Commissioner Raipur.

the same principles as that reported in II. C. P. L. R. 156. The suit was brought in anticipation of possible future litigation and was entirely unnecessary, as the Court of first instance held. How in the circumstances that Court considered itself justified in granting a decree, which it was entirely within its discretion either to grant or to refuse, I am unable to understand.

The appeal is decreed with costs. The decree of the Lower Appellate Court is set aside and the suit of the Plaintiff Respondent stands dismissed.

Counsel for Appellant—Mr. Dillon Barrister-at-law.

for Respondent—Mr Bhutnath De Pleader.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 121[a] of 1891.

Decided on 2nd February 1892.

Parvarasali, Faizali and others.....Plaintiffs.

Mt. Wajidi Begum and others.....Defendants.

** A suit for a mere declaration without consequential relief is governed by Article 100, Schedule 2 of the Limitation Act 1877.*

Two grounds have been urged in this appeal, namely, 1st that the Plaintiffs Respondents had no right to bring a suit for a mere declaration, but were bound to bring a suit for redemption, and 2nd ly that it was barred by limitation as a suit for declaration.

The prayer for a declaration was based on foreclosure proceedings taken in 1880 and in the plaint the cause of action is stated to have arisen on the 9th September 1880. The plaint was filed on the 2nd April 1889. There is no Article in the second Schedule of the Limitation Act 1877 specially providing for the cause of a suit for declaration such as that now in question and it was argued in the Lower Appellate Court as it has been argued in this Court, that the Article applicable is No. 100, which would give a period of six years. The decision of the Lower Ap-

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[a] This was a second appeal from the decision in appeal by the Deputy Commissioner Wardha. The suit was originally decided by the Extra-Assistant Commissioner Wardha.

pellate Court on this point is not very intelligible or convincing. The Deputy Commissioner after noticing that the Plaintiffs distinctly stated in the plaint that they did not sue for possession and gave a reason why they did not do so, namely that the Defendants were in possession under a separate mortgage from that in respect of which they sought for a declaration, says:—"As a matter of fact Plaintiff's claim that the property be declared free from the mortgage of January 20th 1879 involves recovery of such possession of the immoveable property as is possible by reason of its admitted subjection to the possession of Defendants under a later mortgage. The plaint has been badly drafted; but this is the evident object of the claim and I therefore consider that the 60 year's term of limitation is applicable." The Lower Appellate Court does not say what sort of possession it was possible to give the Plaintiffs in the circumstances and I observe that it gave no decree for any sort of possession, but merely a declaratory decree. It is perfectly clear that only a declaratory decree was asked for and I am not aware of any Article applicable to the case except No 100 under which the suit was barred. I think then that the suit must fail on the ground of limitation and it does not appear necessary to go into the other question that has been raised.

The appeal is allowed and the decree of the Lower Appellate Court is set aside. The Plaintiff's claim will stand dismissed with costs throughout.

Counsel for Appellant—*Mr. Dillon Barrister at-law.*

Respondent—*absent though served.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No 423 of 1891.*

Decided on 22nd January 1892.

Punoo Lodhi.....Plaintiff.

Konda and Narain.....Defendants.

For the purposes of the Registration Act the amount of the consideration and not the actual value of the property sold should be taken

[Supplement to A. S. 18—3—1892.]

Three points are taken in this appeal; 1st that the Lower Appellate Court was wrong in holding that for the purposes of the Registration Act the actual value of the property sold and not the amount of the consideration, should be taken;

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On the first point the Lower Court was clearly wrong and the learned Advocate for the Respondent admits that he cannot support the Lower Court's decision in view of the rulings cited on behalf of the Appellant *viz* 15 W. R. 558, 11 Bom. H C. R 149, and I. L. R 8 Bom 377 It would be altogether intolerable that in the case of every instrument which might or might not require to be registered according to the value of the property affected by it, the

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* This was a second appeal from the decision in appeal by the Deputy Commissioner Balaghat The suit was originally decided by the Extra-Assistant Commissioner Balaghat

actual value of the property should be subject to enquiry in order to ascertain whether the deed was admissible in evidence or not. The result of such a state of things would be that there could be no such thing as a cheap purchase of immoveable property.

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The appeal is dismissed with costs.

Counsel for Appellant—*Mr. Dillon Barrister-at-law.*

,, *for Respondent*—*Mr. B K. Bose Advocate*

Note—The remainder of the judgment was of no general interest and has therefore been omitted.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Civil Reference No 144 of 1891.*

Decided on 15th February 1892.

Chittarsao..... Plaintiff.

Bahadur..... Defendants.

The Defendant in this case agreed to sell and Plaintiff to buy certain land, field crops and trees standing on the land for Rs 1400 and Defendant accepted Rs 5 as earnest money but he (Defendant) subsequently delayed execution of the deed of conveyance and ultimately sold the same land crops and trees to a third party for Rs 1000 Plaintiff sued Defendant for Rs 150 for damages on account of breach of contract The claim was dismissed on the ground that Plaintiff could not sue for compensation without suing for specific performance. Held that the Plaintiff was competent to waive any right that he might have to demand specific performance and to sue merely for compensation for direct loss sustained by reason of the breach of contract He can not be refused such compensation on the ground that he does not sue for specific performance also

Proceedings of the Court of the District Judge Nimar in appeal under provisions of Section 617 C. P. Code.

Claim 150 damages on account of breach of contract.

Tried by the Court of Tahsildar Khandwa and Rs. 5 awarded as damages.

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* This was a civil reference by the Deputy Commissioner Nimar

The facts are, Defendant agreed to sell and Plaintiff to buy certain land, field crops and trees standing on the same land for the sum of Rs. 1400. Rs. 5 were accepted by Defendant as earnest money. Subsequently Defendant delayed execution of the deed of conveyance and ultimately sold the same land, crops and trees to a third party for 1600.

The Lower Court held that Section 73 Contract Act ruled the case and dismissed the suit all except for the sum of Rs. 5. In appeal it was urged that if Plaintiff waived specific performance of the contract and was content to receive compensation for loss sustained he was entitled to a decree for the amount of loss actually sustained which he says is the value of the crops. I am of opinion that the breach of the contract is not one to be thus treated. The loss sustained is in fact the right of possessing the land with all the advantages arising out of that possession. If this loss can be adequately relieved by a money payment then by Section 21 Specific Relief Act the Plaintiff cannot bring a suit for specific performance but can claim damages. Plaintiff however admits in appeal that he cannot adequately be relieved of his loss by a mere money payment. His loss is more than can be equitably relieved at present. This being so I consider that his proper action was to proceed under Section 19 Specific Relief Act and sue for specific performance and also claim compensation for the direct and immediate loss he sustained in not enjoying the profits of the land.

The suit is one in which no Second Appeal lies but as the point raised is one of considerable importance I make this reference under provisions of Section 617 Civil Code for the decision of the Judicial Commissioner's Court.

I am unable to see any difficulty in this case. The Plaintiff was competent to waive any right that he might have to demand specific performance and to ask merely for compensation for direct loss sustained by reason of the breach of contract. He can not be refused such compensation on the ground that he does not sue for specific performance also.

Let the reference of the Deputy Commissioner be answered accordingly.

* *Counsel for Plaintiff—Mr. B. K. Bose Advocate.*

* *Defendant—absent though served.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. I

Second Appeal No. 455 of 1891.*

Decided on 4th February 1892.

Ramprasad..... Plaintiff.

Deokaran Bhagwandas and others..Defendants.

In this case the mortgage to the Appellants was granted by Harbha one of the two brothers in joint estate, to the extent of his share in the undivided property. A few days afterwards the two brothers executed in respect of the whole of the undivided property the mortgage on which the Plaintiff relies. Harbha is now dead and while his right to alienate his interest in the joint property was not disputed, it was contended that as no proceedings were taken in his life-time to create a valid charge by suit and attachment all that the alienees obtained was the transfer of an inchoate right which died with him. Held, following the view taken by the High Courts of Madras and Bombay that the mortgage granted by Harbha created a valid charge on the undivided property of the family to the extent of his share and that, that charge has not been extinguished by his death. See III C. P. L. R. 64.

This case has now been narrowed down to a simple issue. It is now admitted for the Appellant that they can not rest their title on the lease granted to them by Must. Hansa and her sons or on the decree obtained against those persons as they clearly had no title. It does not appear that any question of priority arises between the mortgages now in question, for whereas that granted to the Appellants is a simple mortgage, the other is a mortgage of quite a different character, the stipulation being for possession in lieu

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* This was a second appeal from the decision in appeal by the Commissioner Nerbada Division The suit was originally decided by the Civil Judge Narsingpur.

of interest. It is not disputed that the Plaintiff is entitled to a decree for possession on his mortgage-bond. It is only contended that that decree should be subject to the rights of the Appellants under the mortgage granted to them. The question for decision is, then, whether that mortgage created a valid charge on the estate which is now binding upon it.

The mortgage to the Appellants was granted by Harbha, one of two brothers in joint estate, to the extent of his share in the undivided property. A few days afterwards the two brothers executed in respect of the whole of the undivided property the mortgage on which the Plaintiff relies. Harbha is now dead and while his right to alienate his interest in the joint property is not disputed, it is contended that as no proceedings were taken in his life-time to create a valid charge by suit and attachment; all that the alienees obtained was the transfer of an inchoate right which died with him. In support of this contention the rulings reported in I. L. R. 8 All. 495, I. L. R. 7 All. 731, I. L. R. 5 Cal. 148 (P. C.) and 11 Bom. H. C. Reports 76 have been cited. It appears to me that none of these rulings go the length of laying down that where a charge has been created by a member of an undivided Hindu family during his life-time for the payment of a debt, the property of the family is not liable for that debt after his death. though they are authority for the proposition that the family property is not so liable where the debt is a simple unsecured debt, unless a charge has been created by attachment of the debtor's interest during his life-time. On the contrary there is a passage in the Privy Council ruling in the case above referred to at pages 173 and 174 I. L. R. 5 Cal. which appears to support the Appellant's contention. The case was a Bengal case and in the course of the judgment their Lordships noticed (at pages 166 and 167) that while in Madras

and Bombay it was now settled law that one coparcener might dispose of ancestral undivided estate even by private contract and conveyance to the extent of his own share, that law had not yet been adopted in Bengal. At pages 173 and 174 their Lordships say:—"If the law of the Presidency of Fort William were identical with that of Madras, the mortgage executed by Adit Sahai in his life-time as a security for the debt might operate after his death as a valid charge upon Mouzah Bisumbharpur to the extent of his own, then share. The difficulty is that so far as the decisions have yet gone, the law as understood in Bengal does not recognise the validity of such an alienation." Finally their Lordships decided the case in favour of the creditor on the ground that in any case the execution proceedings that had been had before the death of Adit Sahai had gone so far as to constitute a valid charge upon the land to the extent of Adit Sahai's undivided share and interest therein which could not be defeated by his death before the actual sale of the attached property. It would appear, then, that their Lordships of the Privy Council adopted what I must say seems to be the only logical principle, that the question whether a charge created by a member of an undivided family to secure a debt would prevail after his death depends on the question whether by the personal law to which he is subject he is competent to make an alienation of the undivided property to the extent of his own share.

The Lower Appellate Court, which held that in general a member of an undivided family under the Mitakshara law has not a right to mortgage without the consent of the other members his share in the undivided property in order to raise money for his own purposes, seems to have overlooked that the law has been differently expounded, as their Lordships of the Privy Council remark, by the Courts in different parts

of India and that the view taken by the High Courts of Madras and Bombay has been followed for many years in these Provinces. It may refer to the ruling of this Court reported in III C. P. L. R. 54. The learned Counsel for the Plaintiff Respondent frankly admits that this is the case.

I must therefore hold that the mortgage granted by Harbha on the 25th September 1883 created a valid charge on the undivided property of the family to the extent of his share and that that charge has not been extinguished by his death.

This appeal is therefore decreed with costs. The decree of the Lower Courts will be so far modified that the decree for possession made in favour of the Plaintiff Respondent shall be subject to the rights of the Defendants Appellants under the mortgage of the 25th September 1883 held by them from Harbha.

Counsel for Appellant—Messrs. Dick and B. K. Bose Advocates.

" *for Respondent—Mr. Dillon Barrister-at-law.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 497 of 1891.*

Decided on 9th February 1892.

Akharkhan ..... Plaintiff.

Mt. Fazilabi and Kishen Teli..... Defendants.

A mortgaged his house for a sum of money to B and told C his brother-in-law that he might take the house if he would pay his debt due to B. C paid the principal debt and took possession of the house for a time, but it was afterwards sold by D, sister of A to E who again sold it to F. C sued to obtain possession of the house, but his claim was dismissed, on the ground that he had no claim to possession. It was held that he, C, could at the outside bring a suit for the mortgage money and proceed against the mortgaged house. C then sued for interest, the principal sum having been paid to him. Held that there was no transfer of the mortgage to C and that at the most he only acquired an equitable right to be repaid the amount which he had advanced, as he had done it gratuitously. Held also that C's claim was barred by Article 132, Schedule II of the Limitation Act as the money was paid by him 12 years before the institution of the suit.

It appears that the brother-in-law of the Plaintiff Respondent, having mortgaged his house for Rs. 75, sent for the Plaintiff on his death-bed and told him that he might take the house if he would pay the debt. The Plaintiff paid the principal two years afterwards and took possession of the house for a time, but it was afterwards sold by his sister, the widow, to a person who again sold it to the present Appellant.

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* This was a second appeal from the decision in appeal by the Civil Judge Saugor. The suit was originally decided by the Extra-Assistant Commissioner Saugor.

The Respondent sued to obtain possession of the house, but his claim was finally dismissed by this Court on the 25th March 1890 with the observation that he "could at the outside bring a suit for the mortgage money and proceed against the mortgaged house. It appears that as a matter of fact the Plaintiff has been repaid the principal amount of Rs. 75 advanced by him; but in the present suit he sued for interest at the rate fixed in the original mortgage-bond. The first Court gave him a decree in full; but the Lower Appellate Court, considering the amount exorbitant, reduced it very considerably.

It has been contended here, as it appears to have been contended in the Courts below, that in the peculiar circumstances of the case there was no transfer of the mortgage to the Plaintiff and that at the utmost he only acquired an equitable right to be repaid the amount which he had advanced and I am inclined to take this view. The payment was made gratuitously and not by a person interested to make it as a subsequent mortgagor or a co-sharer in the property. I think, then, that he can not be said to stand in the shoes of the mortgagee and that all that he can be said to have acquired is a charge on the property. He has already been repaid what he advanced and if he had not, his claim is clearly barred by Article 132 of the second Schedule of the Limitation Act, which is applicable to charges upon property as distinguished from mortgages (I. L. R. 10 Bom. 579); for the payment was made more than 12 years before the date of the institution of this suit. The Plaintiff Respondent relies on Sections 18 and 20 of the Limitation Act to extend the period. I do not see how the former Section applies. Section 20 is relied on in consequence of the Appellant's having repaid the Rs. 75; but I find that the repayment was made after the ex-

piration of 12 years from the payment by the Plaintiff Respondent of the mortgage-debt.

I must hold then, that the Plaintiff Respondent's claim to interest is barred and I therefore set aside the decree of the Lower Appellate Court, so that the Plaintiff Respondent's suit stands dismissed with costs throughout.

The cross appeal as to the amount of interest is dismissed.

Counsel for Appellant—Mr. Dillon Barrister-at-law.

Respondent—In person.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 501 of 1891.*

Decided on 15th February 1892.

Ramji..... *Plaintiff.*

Dewaji, Ragho Krishen, Ragho Mahar and Dina ...*Defendants.*

In a suit by a landlord to enforce a right of pre-emption over certain absolute occupancy fields, which were sold in execution of a decree, it was contended for the Plaintiff that he was entitled to deduct the time between his application to the Collector to fix the value of the land and the passing of orders by the Collector. Held that Section 9 of the Limitation Act had no application to the case. Articles 10 and not Article 120 applies to the case. There is no distinction in principle between the involuntary transfer effected by foreclosure in a case of conditional sale and the involuntary transfer effected by execution sale IV C. P. L. R. 72 followed.

This was a suit by a landlord to enforce a right of pre-emption over certain absolute occupancy fields which were sold in execution of a decree. Possession was obtained by the auction purchasers on the 26th April 1889. The suit was instituted on the 11th December 1890. The claim was met by a plea that the suit was barred by limitation under Article 10 of the second Schedule of the Limitation Act, 1877. It was contended for the Plaintiff that he was entitled to deduct the time between his application to the Collector to

* This was a second appeal from the decision in appeal by the Deputy Commissioner Bhandara. The suit was originally decided by the Extra-Assistant Commissioner Bhandara.

Supplement to N. J. 8—6—1892.]

fix the value of the land and the passing of orders by the Collector, that is from the 30th January 1890 to the 16th October 1890.

The first Court held that though the Plaintiff would have been entitled to the deduction if he had made his application to the Collector while the sale proceedings were pending, he was not so entitled in view of the Provisions of Section 9 of the Limitation Act, because time had begun to run before he made the application.

The Lower Appellate Court held that Section 9 of the Limitation Act had no application to the case and decreed the Plaintiff's claim, holding that it was "but equitable" that the period during which the proceedings were pending before the Collector should be deducted.

The decision of the Lower Appellate Court was perfectly right on the first point, but it was certainly wrong in so far as it allowed the deduction, which is entirely unauthorised by law. The learned Counsel who represents the Plaintiff, new Respondent, in this Court admits that he cannot support the decision of the Lower Appellate Court as it stands. He contends, however, that Article 10 of the second Schedule of the Limitation Act does not apply and that Article 120 is the only one applicable. He argues that the mention of the registration of the instrument of sale in the third column against Article 10 indicates that none but voluntary sales were contemplated and he urges as the reason why the Article should apply to voluntary and not to involuntary sales, that where there is a voluntary sale the person having the right of pre-emption has notice of the sale in consequence of the registration of the instrument. The learned

Counsel seeks to distinguish the case reported in 4 C. P. L. R. 72, in which it was held that Article 10 applied to cases of foreclosure where there had been conditional sale, from cases of sale in execution proceedings on the ground that in a case of conditional sale there is a registered instrument, so that the person having a right of pre-emption has notice from the registration of the instrument.

Now it seems to me that the theory that the person having a right of pre-emption has notice from the registration of the instrument cannot hold in a case where physical possession of the property sold is taken by the purchasers and that the notice in such cases is the taking of physical possession. It is obvious that even in the case of a voluntary sale the question whether the instrument of sale would be registered or not would depend upon the value of the interest transferred. It could not possibly be contended that in the case of a voluntary sale of property valued at less than 100 Rs. by an instrument duly executed, but not registered, where physical possession had been taken by the purchaser of the property sold, Article 10 would not apply. Yet in that case the person having the right of pre-emption would not have had the notice which, it is contended, the fact of registration would give him.

I am unable to see any distinction in principle between the involuntary transfer effected by foreclosure in a case of conditional sale and the involuntary transfer effected by execution sale. In the former case the property becomes that of the vendee, not by the operation of the instrument of conditional sale, but by the act of the Court in passing a decree for absolute foreclosure, just as in an execution sale the transfer takes place by an act of the Court. I do not under-

stand moreover how it could be said that the registration of the deed of conditional sale gave the land-lord any notice of the absolute sale, which might not take place for years after. I think then, that the ruling of this Court above referred to is in point and that I must hold that Article 10 applies.

It has been urged that great hardship might arise under this construction of the law; but I conceive that the Courts are bound to administer the law as they find it and that if hardship is found in practice to arise, the only remedy is by legislation. In the case now before the Court, at any rate, there is no hardship.

The Plaintiff has only himself to thank for allowing the time to slip by till it was too late for him to seek his remedy.

The appeal is decreed with costs in this Court and in that of the Lower Appellate Court. The decree of the first Court is restored.

Counsel for Appellant—Mr. B. K. Bose Advocate.

for Respondent—Mr. Dillon Barrister-at-law.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner C. P.

Second Appeal No. 521 of 1891.*

Decided on 18th February 1892.

Ramji..... Plaintiff.

Fakira Lodhi.....Defendant.

[Supplement to N. S. 22 - 6 - 1892.]

The Plaintiff in this case who was a thekadar sued Defendant as an ordinary tenant for enhancement. Defendant offered to pay an enhanced rent at a lower rate than that demanded by the Plaintiff. This the Plaintiff accepted, and a decree was made accordingly by the first Court. The Defendant then appealed on the ground that he was an occupancy tenant, alleging that being an illiterate man he had been unable to state before the Lower Court the exact year in which he had obtained possession of his holding. The Lower Appellate Court, however, set aside the decree of the first Court on another ground, viz., that the Plaintiff being a Thekadar, had no power to enhance in the absence of an express stipulation in the Thika lease to that effect.

Held that the Defendant had no right to ask for the setting aside of a decree to which he had consented merely on the ground that he had not chosen to make a defence in the first Court. He was bound by that decree unless he could show that his consent had been obtained by fraud. A Thikadar is a "landlord" within the definition of that term in Section 3, sub-Section 3 of the Tenancy Act. A Thikadar or farmer for a term of years, therefore, can enhance, in the absence of an express stipulation in the lease to the contrary.

The Plaintiff now appellant, who is a *thikadar* sued the Defendant, now Respondent, as an ordinary tenant for enhancement. The Defendant raised no question as to his own status or as to that of the Plaintiff, but

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* This was a second appeal from the decision in appeal by the Deputy Commissioner Bhandara. The suit was originally decided by the Extra-Assistant Commissioner Bhandara.

offered to pay an enhanced rent at a lower rate than that demanded by the Plaintiff. This the Plaintiff accepted and a decree was made accordingly by the first Court.

The Defendant then appealed on the ground that he was an occupancy tenant, alleging that he, being an illiterate man, had been unable to state before the Lower Court the exact year in which he had obtained possession of his holding, that the Lower Court had consequently come to the conclusion that he was an ordinary tenant and that he had therefore been obliged to agree to the enhancement to save himself from ejectment.

The Lower Appellate Court did not notice the grounds urged by the Defendant but set aside the decree of the first Court on the ground that the Plaintiff, being a *thikadar*, had no power to enhance in the absence of an express stipulation in the *thika* lease that he should exercise such power.

It is urged in Second Appeal that the Lower Appellate Court was wrong in law,

1st in setting aside a decree which had been passed by consent, and,

Secondly in holding that a *thikadar* had no power to enhance unless the *thika* lease expressly provided that he should have that power.

As regards the first point I think that the Lower Appellate Court ought to have dismissed the appeal. The Defendant had certainly no right to ask for the setting aside of a decree to which he had consented merely on the ground that he had not chosen to make a defence in the first Court, for that is practically what it came to. He was bound by that decree unless he could show that his consent had been obtained by fraud.

As to the second point it has been held in Bengal (I. L. R. 2 Cal. 474) that an *Ijardar* or farmer for a term of years can enhance in the absence of an express stipulation to the contrary.

The Lower Appellate Court cites no authority and gives no reasons in support of its view, and I think that it is untenable in the face of the provisions of the Tenancy Act. A *Thikadar* is a 'landlord' within the Definition of that term in Section 3 (Sub-Section 3) of the Act and as such he is entitled to take proceedings for enhancement in the manner provided by Sections 56 and 57 unless he is restrained from so doing by a stipulation to that effect in his lease.

I think, then, that the decree of the Lower Appellate Court is altogether bad and must be set aside.

The appeal is decreed with costs in this Court and in the Lower Appellate Court. The decree of the Lower Appellate Court is set aside and that of the first Court is restored.

Counsel for Appellant—Mr. Fraser Barrister-at-law.

Respondent—In person.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 662 of 1891.*

**Decided on 16th March 1892.*

Bhopalsing and Kanhyalal..... Plaintiffs.
Thakur Borelal and Nanhu..... Defendants.

In this case the question was what is the position of a sub-tenant when the tenancy of the person from whom he holds has been determined by a surrender of it to the Malguzar. Held that when the tenancy is determined, the sub-tenancy which is grafted upon it is necessarily determined also and the sub-tenant can not become a tenant under the Malguzar except under a special contract.

The question at issue in this case is what is the position of a Sub-tenant when the Tenancy of the person from whom he holds has been determined by a surrender of it to the Malguzar. The Lower Appellate Court holds that the Sub-tenant *ipso facto* becomes an ordinary tenant of the Malguzar. I think that this is incorrect. It seems to me clear that when the Tenancy is determined, the sub-tenancy which is grafted upon it is necessarily determined also and that the Sub-tenant cannot become a tenant under the Malguzar except under a contract of tenancy entered into directly with him.

The appeal is decreed with costs in this Court and in the Lower Appellate Court. The decree of the first Court is restored.

Counsel for Appellant—Mr. Dillon Barrister-at-law.

Respondent—In person.

* This was a second appeal from the decision in appeal by the Civil Judge Saugor. The suit was originally decided by the Extra-Assistant Commissioner Saugor.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner C. P.

Second Appeal No. 670 of 1891.*

Decided on 18th March 1892.

Mt. Sardar Bahu and Mt. Kashi Bai...Plaintiffs.

Gopal and Shamley..... Defendants.

An instrument can not be used to enforce a lien of more than Rs. 99. For the calculation of the value of the right, title or interest dealt with by a document for the purpose of the Registration Act, only the principal amount secured by that document is to be taken into consideration.

The question of the admissibility of a document to establish a lien and the question of the extent to which the document operates to establish a lien are altogether different.

[*Supplement to N. S.* 29—6—1892]

This is a suit under Section 99 of the Transfer of Property Act 1882 to bring mortgaged property to sale for the realisation of a sum of Rs. 330, principal and interest, the mortgage having been effected by an unregistered instrument for a sum of Rs. 99. The Courts below have held, following this Court's ruling in select case No. 1, that that instrument can not be used to enforce a lien of more than Rs. 99. It is contended for the Appellants that the portion of this Court's judgment which has been followed by the Courts below was merely an *obiter dictum* and that the instrument, if valid at all, is valid altogether for any amount that may become due upon it.

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* This was a second appeal from the decision in appeal by the Civil Judge Saugor. The suit was originally decided by the Extra-Assistant Commissioner Saugor.

I think that there was no *obiter dictum*, but a direction which this Court considered necessary for the guidance of the Court of first instance, to which it remanded the case for disposal. In any case this Court followed the Allahabad case reported in I. L. R. 3 All. 1, which is distinct authority for the proposition of law which it laid down. No authority has been shown against it. The cases which have been cited for the Appellants are authority only for the proposition, which is not disputed, that for the calculation of the value of the right, title, or interest dealt with by a document for the purpose of the Registration Act only the principal amount secured by that document is to be taken into consideration. The question of the admissibility of a document to establish a lien at all and the question of the extent to which the document operates to establish a lien are altogether different.

I think that the Lower Courts decided the latter question correctly in the present case and I dismiss the appeal with costs.

Counsel for Appellant—Mr. Balwant Rao, Advocate.

„ *for Respondent—Mr. B. K. Bose, Advocate.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 653 of 1891.*

Decided on 18th March 1892.

Dhirajsing and Ramlal..... Plaintiffs.

Mt. Kalo and Ramlal minor through Ganpatsing ...Defendants.

An order of remand under Section 562 of the Code of Civil Procedure by an Appellate Court for a second decision is illegal if the suit is not disposed of on a preliminary point so as to exclude evidence of fact which was essential to the determination of the rights of the parties.

Deciding a question of fact on insufficient grounds and disposing of a suit on a preliminary point are manifestly not convertible terms.

I think that I must treat the present case in accordance with the Full Bench decision of the Allahabad High Court which has already been followed by this Court in the case reported in V. C. P. L. R. 116 and in unreported cases. It is quite clear that the order of remand passed by the Lower Appellate Court on the 11th April 1891 under Section 562 Code of Civil Procedure was bad. The Lower Appellate Court in its judgment on that occasion remarked of the judgment of the Court of first instance, "In my opinion this decision has been arrived at on no sufficient grounds:—The suit has in fact been disposed of on a preliminary point." Now deciding question of fact on insufficient grounds and disposing of a suit on a

* This was a second appeal from the decision in appeal by the Commissioner Nerbada Division. The suit was originally decided by the Civil Judge Narsingpur.

preliminary point are manifestly not convertible terms. The Court of first instance came to a decision on each of the issues which it had fixed and it is impossible to say in this state of things that it disposed of the case on a preliminary point, however imperfect its inquiry might have been or however erroneous its decision.

As it is a question of jurisdiction, I am bound to deal with the case accordingly. All that has been done since the remand of the 11th April 1891 has been without jurisdiction. I must therefore set aside the present decree of the Lower Appellate Court and direct that the original appeal disposed of on the 11th April 1891 be restored to the file and dealt with according to law. There is nothing to prevent the Lower Appellate Court from acting in accordance with the provisions of Section 566, Code of Civil Procedure or taking or causing to be taken any additional evidence that it may think fit. The Court fee stamp on this appeal will be refunded. Costs will follow the result.

Counsel for Appellant—Mr. B. K. Bose, Advocate.

,, *for Respondent—Mr. Dillon, Barrister-at-law and Mr. Durga Prasad, Pleader.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 564 of 1891.*

Decided on 3rd March 1892.

Mt. Radha.....Plaintiff.

Mt. Mathura and Guneshji.....Defendants.

[*Supplement to N. S.* 6—7—1892.]

A Hindu widow is not, during a state of unchastity, entitled even to a starving maintenance.

The Plaintiff now Respondent sues for maintenance as a widow. Her claim was resisted on the ground that she had been unchaste since her husband's death. The Courts below gave her a decree for starving maintenance only, relying upon the ruling of this Court noted in the Digest of Civil Rulings part VIII page 30 as No. 75. The Lower Appellate Court remarks that there are rulings of the Bombay High Court which go against an unchaste widow having any claim on her husband's relatives for maintenance but that a similar rule does not appear to have been distinctly laid down in these Provinces. I think that there is clear authority for holding that an unchaste widow forfeits her right to maintenance at least so long as she remains in a state of unchastity. The rulings which go to support this proposition are not confined to the Bombay High Court. There is a recent similar ruling of the Calcutta High Court reported in the I. L. R. 17 Cal. 674. That ruling is founded on the Dayabhaga; but the Mitakshara and the Dayabhaga are here at

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* This was a second appeal from the decision in appeal by the Commissioner Jabalpur Division. The suit was originally decided by the Civil Judge Saugor.

one. The text of the Mitakshara in Chapter I Section I, 7, is quite decisive. I have sent for and read the judgment of this Court referred to above as noted in the Digest and I find it expressly stated that in that case there was a distinct acquiescence on the part of the person from whom maintenance was claimed so far as the giving of some maintenance was concerned. The only question was what a proper maintenance to be given in the circumstances. That case must not, therefore, be taken as authority for the proposition that a widow is entitled even to starving maintenance while she continues in a state of unchastity. I think that what the Lower Courts should have done was to inquire not only whether the Plaintiff had been unchaste; but whether she was unchaste at the time of the institution of the suit and that they should have given or withheld the starving maintenance according to the finding.

The case is remanded for a trial of the issue whether the Plaintiff was living an unchaste life at the time of the institution of the suit.

The Lower Appellate Court is at liberty to cause any evidence which may have to be taken by the first Court. The finding and the evidence are to be returned to this Court within 6 weeks from this date. The parties will have 7 days from the date of the receipt of the finding to object.

Counsel for Appellant—Mr. B. K. Bose Advocate.

Respondent—absent though served.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 629* *of* 1891.

Decided on 22nd March 1892.

Dajiba Patel..... *Plaintiff.*

Dinanath and others..... *Defendants.*

Where a Plaintiff seeks to establish his right to property which was attached in execution proceedings as that of a judgment-debtor after having failed in an attempt to procure the removal of the attachment in the course of those proceedings, held that the burden of proof lies upon the Plaintiff to prove the payment of the purchase-money and possession of the property since the alleged transfer.

This case has been argued for the Plaintiff Appellant on the basis of the general principle that where it is sought to impeach a deed of transfer for value, the burden of proving that the transaction was not real and *bona fide* lies upon the person who impeaches it. The question is whether that rule applies in a case of this kind, where a Plaintiff seeks to establish his right to property which was attached in execution proceedings as that of a judgment-debtor after having failed in an attempt to procure the removal of the attachment in the course of those proceedings. The High Court of Bombay has held more than once that in such cases the burden of proof lies upon the Plaintiff and that the Plaintiff must prove the payment of the purchase money and possession of the property since the alleged transfer. See I. L. R. 12 Bom. 270. I agree in that view.

The appeal is dismissed with costs.

Counsel for Appellant—Mr. Fraser Barrister-at-law.

„ *for Respondent—Mr. Dick Barrister-at-law.*

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* This was a second appeal from the decision in appeal by the Deputy Commissioner Bhandara. The suit was originally decided by the Extra-Assistant Commissioner Bhandara.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 642* *of* 1891,

Decided on 24*th March* 1892.

Wasudeo Bhaskar..... *Plaintiff.*

Sheoram and Raoji..... *Defendants.*

A Malguzar who purchases Malik Makbuza land is not a Malik Makbuza in respect of that land after his purchase.

The question is whether the Plaintiff Appellant, being a *Malguzar* and having purchased *Malik-makbuza* land, is a Malik-makbuza in respect of that land after his purchase. I think that the Lower Courts are right in holding that he is not. Both the original definition in Act XVIII of 1881 and the definition as amended by Act XVI of 1889 appear to support the decision and the amended definition especially seems to make it perfectly clear that a man cannot be at the same time a *Malguzar* and a Malik-makbuza. The fact that the Plaintiff Appellant purchased the right before Act XVIII of 1881 came into force does not affect the question of his position now.

The appeal is dismissed with costs.

Parties—In person.

* This was a second appeal from the decision in appeal by the Deputy Commissioner Wardha. The suit was originally decided by the Extra-Assistant Commissioner Wardha.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 638* *of* 1891.

Decided on 29th March 1892.

Sheik Wazir..... *Plaintiff.*

Mt. Phulla..... *Defendant.*

[*Supplement to N. S.* 13—7—1892.]

Section 107 of the Civil Procedure Code applies only in cases where a summons is issued after the perusal of the plaint for the first appearance of the Defendant in person on the date specified for the hearing or an order passed at the same time for the personal appearance of the Plaintiff on that date. It is not applicable in cases where a party is summoned as a witness at any stage of the proceedings.

The Lower Appellate Court dismissed the present appeal under the provisions of Section 107, Code of Civil Procedure, on the ground that the Appellant who is a woman, did not appear in person on being required to do so during the pendency of the appeal.

It seems to me unnecessary to enter into any question arising out of the provisions of Section 640 of the Code, because I think that Section 107 was not applicable to the case. That Section on the face of it applies only in cases where a person has been ordered to appear under Section 66 or under Section 436 of the Code. With the latter Section we have now nothing to do. It is clear that Section 66 contemplates a summons issued after the perusal of the plaint for the first appearance of the Defendant in person on the date specified for the hearing or an order passed at the same

* This was a second appeal from the decision in appeal by the Deputy Commissioner Hoshangabad. The su was originally decided by the Extra-Assistant Commissioner Hoshangabad.

time for the personal appearance of the Plaintiff on that date. It does not contemplate the summoning of a party as a witness at any stage of the proceedings. A provision such as that contained in Section 107 ought certainly to be construed with the utmost strictness and in any case the presence of provisions such as those contained in the second para of Section 120, in Section 177 and in Section 178 of the Code would show clearly that Section 107 is not intended to apply to every case in which a Court may direct a party to appear and the party may disobey the order whether with or without sufficient reason.

I think that the decision of the appeal under Section 107 Code of Civil Procedure was thus illegal. The decree in appeal is set aside. The appeal is remanded to the Lower Appellate Court to be disposed of according to law. Costs will abide the result. The Court-fee on the petition of appeal will be refunded.

Counsel for Appellant—Mr. *B. K. Bose, Advocate.*

„ *for Respondent—Mr, Balwant Rao, Advocate.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 706* *of* 1891.

Decided on 29th March 1892.

Jagannath Kewalram..... Plaintiffs.

Mt. Chand Bi and Chand Khan... Defendants.

A party is not debarred from getting a deduction of the time during which his case has been pending before the wrong Court because he instituted it on the last day of the period at the expiration of which it would become barred.

Section 14 of Act XV of 1879 is intended to apply to cases where the mistake in institution was made in good faith in the sense that there was no pretended mistake intentionally made, as with a view of delaying the proceedings or harassing the opposite party, and where the case once instituted was proceeded with diligently and in good faith.

The Courts below have held that the Appellant was not entitled to a deduction of the time during which his case had been pending before the wrong Court on the ground that he did not prosecute his case with due diligence because he instituted it on the last day of the period at the expiration of which it would become barred and that he did not prosecute it with good faith because if he or his pleader had exercised more care and attention, they would have found that they ought to have instituted it in another Court. The case reported in I. L. R. 10 All. 524 is cited in support of this decision. That case had reference to an

* This was a second appeal from the decision in appeal by the Civil Judge Nagpur. The suit was originally decided by the Munsiff of Nagpur.

appeal, to which Section 14 of the Limitation Act, relied upon in the present case, does not apply. I think that an expression of opinion as to what would have been the effect on the decision of that case if Section 14 had been held to apply can scarcely be taken as authority, being very much of the nature of an *obiter dictum*. It seems to me that as was held in a case reported in 15 B. L. R. 56, in which the question arose in connection with the analogous provision in Act XIV of 1859, which was practically identical with the provision now relied upon in Section 14 of Act XV of 1877, the good faith and diligence have reference solely to the conduct of the suit. I think that it is impossible to maintain that a man does not use due diligence so far as the institution of this suit is concerned if he institutes it in time, even though he may institute it at the last hour of the last day within time. I think that on the principle asserted by the Courts below the provisions of Section 14 of the Limitation Act would become practically a dead letter, for it is difficult to see how a mistake should arise which should not be founded on some error of law or of fact or of both which complete care and knowledge might have prevented. It seems to me that Section 14 is intended to apply to cases where the mistake in institution was made in good faith in the sense that there was no pretended mistake intentionally made, as with a view of delaying the proceedings or harassing the opposite party, and where the case once instituted was similarly proceeded with diligently and in good faith. The appeal is decreed. The decrees of the Lower Courts are set aside. The suit will be tried on its merits. Costs will abide the result.

Counsel for Appellant—Mr. Balwant Rao, Advocate.

„ *for Respondent—Mr. P. N. Dutt; Advocate.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 623* *of* 1891.

Decided on 28*th March* 1892.

Seth Nanheylal minor through Dalchand... Plaintiff.

Kaluram, Kanhya, versus Fatehchand, Kanhyalal, Mt. Kaveri and Mt. Bhowaria } *Defendants.*

[*Supplement to N. S.* 20—7—1892.]

Defendants I and II in this case mortgaged certain property first to the Plaintiff and then to Defendants III and IV. The Plaintiff sued on the mortgage deed making the puisne mortgagees Defendants in the suit. Two other persons claimed to be made parties to the suit on the ground among others that they had an interest in the property mortgaged to the extent of one-half. These persons were accordingly made parties as Defendants V and VI. The first Court gave the Plaintiff a decree against all Defendants. The 5th and 6th Defendants then appealed and the Plaintiff's claim was dismissed as regards the share of the mortgaged property which they claimed as their own. The Plaintiff did not appeal against the decree of the Lower Appellate Court, but the 3rd and 4th Defendants appealed making the 5th and 6th Defendants Respondents. Held that as the Appellants were not bound by the decision, they had no right of appealing. Held further that the decision in this suit will not be a bar under Section 13 of the Code of Civil Procedure to a fresh suit by them against the co-Defendants.

The 1st and 2nd Defendants in the original case mortgaged certain property first to the Plaintiff and then to the 3rd and 4th Defendants. The Plaintiff sued on the mortgage deed making the puisne mortgagees Defendants in the suit. Two other persons came forward and claimed to be made parties to the

* This was a second appeal from the decision in appeal by the Commissioner Nerbada Division. The suit was originally decided by the Civil Judge Hoshangabad.

suit on the ground that they were interested to the extent of one-half in the property mortgaged, that the mortgage had been effected without their consent by the 1st and 2nd Defendants and that they were not bound by the mortgage so far as their share was concerned. These persons were accordingly made parties as Defendants 5 and 6.

The first Court gave the Plaintiff a decree against all the Defendants. The 5th and 6th Defendants then appealed and the Plaintiff's claim was dismissed as regards the share of the mortgaged property which they claimed as their own. The Plaintiff has not appealed against the decree of the Lower Appellate Court, but the 3rd and 4th Defendants have appealed, making the 5th and 6th Defendants the Respondents.

It is contended in favour of the admissibility of this appeal that as the present Appellants, the 3rd and 4th Defendants, made common cause with the Plaintiff as against the Respondents, the 5th and 6th Defendants, the decision of the Lower Appellate Court on the question which they were equally interested with the Plaintiff in contesting against the 5th and 6th Defendants would be *res judicata* in accordance with the ruling of this Court in II. C. P. L. R. 52 and the Calcutta and Allahabad rulings therein cited. A similar ruling in I. L. R. II. Mad. 204 was cited. It was argued that if the 3rd and 4th Defendants were to be bound by the decision, they must have a right of appeal against it.

I am clear that the question of the admissibility of the appeal must be decided against the Appellants. With regard to the argument as to *res judicata* I must observe that the decision of this Court appears to have been based principally on the Calcutta ruling reported in I. L. R. 9 Cal. 120. That has, however, since been over-ruled by a Full Bench of the Calcutta High Court

in the case reported in I. L. R. 12 Cal. 580. It was pointed out that in cases of this kind a Defendant who has an interest in common with the Plaintiff as against his co-Defendant has not the conduct of the suit in his hands and if the Plaintiff were to abandon the suit, so as to cause it to be dismissed, it could not reasonably be held that a fresh suit by that Defendant against the co-Defendant would be barred. It was observed that if that were possible, a person in the position of the Defendant who desired to become Plaintiff would be helpless, for he would not be able to re-open the case or to contest the order passed by appeal to a higher Court. As for the case in I. L. R. IV All. 92, cited in the judgment of this Court in II C. P. L. R. 52, its authority was questioned in another case decided by the same Court and reported in I. L. R. 8 All. 91. Neither this ruling nor the Calcutta Full Bench ruling appears to have been brought to the notice of my learned predecessor who decided the case in II C. P. L. R. 52. I find myself unable to overlook the strong authority of the decision of the Calcutta Full Bench and I am compelled with great respect to differ from the reported ruling of this Court.

One of the grounds stated for the decision in the case in I. L. R. 12 Cal. 580 has a very important bearing on the present case, that is that supposing a Plaintiff to abandon his suit, so as to cause it to be dismissed, the Defendant having a common interest with him against the co-Defendant would be unable to appeal. There is a case so far back as 7 W. R. 366 civil in which it was held that *pro forma* Defendants were not competent by making the real Defendants, who did not appeal, Respondents as between themselves to open out that portion of the case which as between the Plaintiff and the non-appealing Defendants had not been appealed against. The Full Bench

ruling reported in I. L. R. III, All. 152 is strong authority against the admissibility of an appeal of the present kind. In that case M sued K and J to enforce a right of pre-emption in respect of property which he alleged K had sold to J. K denied that she had sold the property to J. J set up as a defence that M had obtained his right of pre-emption. The Court of first instance dismissed the suit on the ground that the alleged sale had not taken place. J appealed, making M and K Respondents. The Lower Appellate Court dismissed the appeal, also holding that the alleged sale had not taken place. J then preferred a second appeal to the High Court, making M the Respondent. At page 156 of the judgment Stuart C. J. said:—

"The Plaintiff's suit against the Defendants has been dismissed and he is not a party to the appeal before us. The appeal is by the Defendants *inter se*, that is the matter in issue being the authenticity and validity of a deed of conditional sale purporting to have been executed by one Defendant as vendor in favour of the other Defendant as vendee. The question, besides, appears to have been considered by both the Lower Courts, who found that the deed of sale had not been proved. An appeal therefore on such a question by one Defendant against another is wholly impossible and as to the provisions of the Code of Procedure I entirely concur in the opinion of my colleagues. I also agree with them that the finding of the Lower Courts, although not admitting of an appeal between the two Defendants, would not bar a suit by one against another for the establishment of the validity of the sale-deed." The point taken by the learned Judges in that case with reference to the Code of Civil Procedure was this that as the right of appeal lies against decrees and as it is provided by Section 577 of the Code that the judgment in appeal may be for confirming, varying or reversing the decree against which the appeal is made, it is to be inferred that the

parties who are allowed to appeal are those who may desire that a decree should be varied or reversed. The judgment went on to point out that in that case the Defendant Appellant did not desire that the decree dismissing the suit should be varied or reversed but complained of a finding in the judgments of the Lower Courts as to the validity of a sale in respect of which the claim to pre-emption was advanced. The learned Judges accordingly held that not only was the second appeal inadmissible, but that preferred to the Lower Appellate Court was inadmissible also.

In the present case, similarly, the Appellants can not have any reason to complain of the decree, as it does not affect them. What does affect them is the finding on which the decree of the Lower Appellate Court is based—that the 5th and 6th Defendants now Respondents have in the mortgaged property an interest which the mortgagors were not competent to transfer. It would be impossible for this Court to alter the decree in the absence of any appeal by the Plaintiff and no appeal lies except from the decree.

No direct authority has been cited as to the admissibility of an appeal by one Defendant against another. All the authority on this point is on the other side.

The appeal is dismissed with costs.

Counsel for Appellant—Mr. Dillon, Barrister-at-law,

„ *for Respondent—Mr. B. K. Bose, Advocate.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 83* *of* 1892.

Decided on 1st July 1892.

Mt. Pilabai..... *Plaintiff.*

Gadi Mhali..... *Defendant.*

Section 41 of the Tenancy Act (Act IV of 1883) does not recognise the acquisition of an occupancy right by a sub-tenant.

The tenant of a Malik Makbuza was not originally a sub-tenant. It was only the amendment introduced into the definition of "sub tenant" by Act XVII of 1889 which made the tenants of Malik Makbuzas sub-tenants. Tenants of absolute occupancy tenants were not tenants under the definition in Section 51 but were sub-tenants, so that they were excluded from the description of occupancy tenants as defined by Section 41.

The Defendant now Respondent, set up as his defence in a suit for ejectment as sub-tenant the plea that having acquired a right of occupancy before the Tenancy Act came into force as a tenant under an absolute occupancy tenant he could not now be ousted. This view has been adopted by the Lower Appellate Court.

The Lower Appellate Court relies mainly on an unpublished judgment of this Court in special appeal No. 78 of 1883, recorded on the 9th April 1883 in

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* This was a second appeal from the decision in appeal by the Deputy Commissioner Chanda. The suit was originally decided by the Extra-Assistant Commissioner Chanda.

which it was certainly held that a sub-tenant could acquire occupancy right. There is, however, a late unpublished judgment of this Court in special appeal No. 466 of 1883, decided on the 23rd February 1884, in which the opposite view was held. In this latter judgment a decision of this Court passed in 1878, which was the chief authority on which the judgment in case No. 78 of 1883 was apparently based, was referred to and expressly dissented from. The main point, however, is, that case No. 78 of 1883 was decided before the Tenancy Act (Act IV of 1883) came into force. We have now to be guided entirely by Section 41 of that Act in deciding who has and who has not an occupancy right and it is quite clear from the terms of that Section that the present law does not recognise the acquisition of an occupancy right by a sub-tenant.

As regards the case in V C. P. L. R., 110, referred to by the Lower Appellate Court, the point is that the tenant of a Malik Makbuza was not originally a sub-tenant. The original definition of a sub-tenant in Section 51 of Act IX of 1883 before it was amended by Act XVII of 1889 was "a tenant who holds land from another tenant." It was only the amendment introduced into the definition by Act XVII of 1889 which made the tenants of Malik-makbuza's sub-tenants. When Act IX of 1883 came into force, they were tenants and if they had at that time held the same land continuously for twelve years as tenants, they were occupancy tenants according to the provisions of Section 41 of the Act. Tenants of absolute occupancy-tenants, on the other hand, were not tenants, but were sub-tenants under the definition in Section 51, so that they were excluded from the description of occupancy tenants as defined by Section 41.

It is clear that the judgment of the Lower Appellate Court is erroneous.

The appeal is decreed with costs throughout, the decree of the Lower Appellate Court is set aside and that of the first Court is restored.

Counsel for Appellant—Mr. B. K. Bose, Advocate.

Respondent—absent though served.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C.S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 338* *of* 1891.

Decided on 3rd March 1892.

Jagannath, Shamlal and Mt. Guneshi...Plaintiffs.

Rambux.....Defendant.

[*Supplement to N. S.* 3—8—1892.]

An award of arbitrators derives its binding force as against the parties entirely from their previous submission, and their subsequent signatures in token of consent in no way affect the character of the award. It is neither more binding upon the parties when signed by them nor less binding when they do not sign it. It is binding in the former case because it is the judgment of a tribunal to which the parties had unconditionally submitted before adjudication and not because they have subsequently acknowledged the justice of the decision.

There is no provision in the Registration Act requiring that an award of arbitrators shall be registered.

Where arbitrators were appointed to actually divide the property and not to fix the extent of the shares of the parties, it was held that they exceeded their authority so far as the fixing of the extent of the shares was concerned and that they did not make a complete division of the property. The award was, therefore, not a valid award. The Privy Council Ruling reported in I. L. R. II. Calcutta, page 386, distinguished.

The 1st and 2nd Plaintiffs Respondents are collateral relatives of the Defendant Appellant. The 3rd

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* This was a second appeal from the decision in appeal by the Commissioner Nerbada Division. The suit was originally decided by the Civil Judge Hoshangabad.

Plaintiff Respondent is the widow of another collateral relative who died without issue. The family holds three villages which, in September and October 1888, were partitioned by perfect partition, each of the parties being put in possession of a one-fourth share.

The Plaintiffs sued for ¾ths of the profits of the three villages in question for the three years immediately before the partition and also for ¾ths of the outstanding debts due to the family. The first Court gave the Plaintiffs a decree and the Lower Appellate Court affirmed it on appeal.

On the date fixed for the hearing of the second appeal the 2nd Plaintiff Respondent Shamlal applied to the Court, stating that matters had been amicably settled between the Appellant and himself and that he had no further concern with the case. He asked that his share of the claim might be dismissed, he and the Appellant bearing their own costs.

The Defendant Appellant pleaded among other matters in the first Court that there had been a complete partition by an award of arbitrators in 1885. The first Court held that the award was inadmissible for want of registration on the ground that having been signed by the parties, it constituted a deed of partition. It also held that the award was not binding upon the parties in as much as although the arbitrators had been directed by the parties to divide the property and had not been directed to do anything more they took it upon themselves on the one hand to decide as to the respective shares of the parties, while on the other hand they did not make a complete division of the property. It further held that the award was bad for misconduct on the part of the arbitrators and that it had been held to be not binding in another suit between the parties. It found that the award had not in fact been acted up-

on and that the Collector had refused to act upon it in the partition proceedings.

The Lower Court does not appear to have come to a distinct finding on the question of the admissibility of the award for want of registration, though I gather from what I find in its judgment that it seems to have been inclined to agree with the Court of first instance. It held, however, that it was inadmissible in that it had not been stamped as a deed of partition.

Of the numerous grounds of appeal taken in this Court all have been given up except those which arise out of the award.

The objections to the admissibility of the award on the grounds that it has not been sufficiently stamped and that it has not been registered rest on the argument that because it has been signed by the parties, it has become virtually a partition deed and the decision to this effect is supported by the ruling reported in I. L. R. 9 Bom. 50. With great deference I am unable to accept that ruling. An award of arbitrators derives its binding force as against the parties entirely from the previous submission of the latter to the jurisdiction of the arbitrators and the subsequent signatures of the parties in token of consent appear to me, I must say, in no way to affect the character of the document. It is neither more binding upon the parties when signed by them nor less binding when they do not sign it. It is binding in the former case because it is the judgment of a tribunal to which the parties had unconditionally submitted before adjudication and not because they have subsequently acknowledged the justice of the decision. I think, then, that whether they sign or not, the award remains an award. In the present case the document has already been stamped as an award and there is no provision of the Registration Act requiring

that it shall be registered. I therefore rule that it is admissible in evidence.

I have then to consider the question of the validity of the award. The Lower Appellate Court has found that there was not misconduct on the part of the arbitrators, so that it must be taken as valid, if it is in accordance with the submission of the parties. Now nothing could be more vague and general than the terms in which the reference is made. The parties set forth that there is a dispute among them with reference to "the division of the private property and the villages" and they undertake to abide by whatever decision the arbitrators may come to. The arbitrators begin by fixing the shares of the parties. They hold that the widow Guneshi is not entitled to any share being a childless widow, and they divide her share between her late husband's brothers, Rambux and Jagannath, making those two persons at the same time liable for her maintenance, as to which they give detailed directions. They then proceeded to specify the division of the houses and the villages and they refer to certain separate lists as showing the division of the *sir*-lands and the other properties. From those lists it appears that certain properties are stated to have been distributed according to the shares, while as regards others it is stated that the parties will divide them according to their shares. Among the latter is the stored grain which could not be opened at the time of the award, which was made in the rainy season.

Did the arbitrators exceed their authority in settling the extent of the shares and did they fall short of their duty in not making an actual physical division of the whole of the property? The submissions are, as I have said, as vague and unsatisfactory as possible. The arbitrators have been examined as witnesses; but they have thrown very little light on the matter. Two

of them say nothing definite as to the intention of the parties, while the third, Lachmanprasad, admits that the arbitrators were appointed to actually divide the property and he can not say whether they were authorised to fix the extent of the shares of the parties. I have not been able to find on the record any evidence to show that before or at the time of the submission to arbitration there was any dispute among the parties as to the extent of their shares, nor is there any evidence, so far as I have been able to see, as to their relations with each other from which their intention can be inferred. In this state of things I think I am bound to give a narrow construction to the submissions and to hold that the parties desired only an actual division of the property which up to that time was joint. In that view I must hold that the arbitrators exceeded their authority so far as the fixing of the extent of the shares was concerned and that they did not make a complete division of the property. On these grounds and chiefly on the former I must hold that the award was not a valid award.

I have been referred by the learned Advocate for the Appellant to the Privy Council ruling in a case from these Provinces reported in I. L. R. II Cal. 386. In that case two co-widows referred to arbitrators 'a difference between them about their respective rights' and it was held by their Lordships of the Privy Council that that reference covered an enquiry as to whether one of the ladies was disentitled by reason of unchastity to succeed to any portion of her deceased husband's estate. That case seems to me to have really nothing in common with the present one. That case was decided on the ground that a reference for decision as to the rights of the parties included an inquiry as to a matter, which, though it was not specifically referred, it was necessary to investigate in order that the question which was referred might be

correctly decided. In the present case there is no such reference as to a general matter which necessarily involves a reference in respect of a particular matter. It can not be said that a dispute as to the division of property necessarily involves a dispute as to the extent of the shares according to which the division was to be made. If there were anything to assist me to the conclusion that the real intention of the parties had been to include a reference as to the extent of their shares, I should feel bound to give effect to that intention; but in the absence of any indication that such was the case I think that as the submissions confer jurisdiction, they must be strictly construed.

So far as the Respondent Shamlal is concerned the appeal is disposed of in accordance with the compromise which has been arrived at between the parties; that is to say so much of the decrees of the Courts below as relates to the claim of Shamlal is set aside, he and the Appellant bearing their own costs.

As regards the Respondents Ramdin (who has been subsituted for the deceased Respondent Jagannath) and Guneshi the appeal is dismissed with costs.

Counsel for Appellant—Messrs. B. K. Bose, Advocate and Durga Prasad Pleader.

„ *for Respondent—Messrs. Fraser, Barrister-at-law and Sukhdeo Prasad Pleader.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 64 of 1892.*

Decided on 26th April 1892.

Sheoram Brahmin..... Plaintiff.

Raghoba..... Defendant.

A Malik-makbuza sued his tenant for ejectment on the ground that he was a sub-tenant. It was found as a fact that he was a tenant, and had held the land in dispute continuously for 12 years before the Tenancy Act came into force i. e. before 1st January 1884. Held that as the operation of the amendment which was effected by Section 12, Act XVII of 1889 in Section 51 of the Tenancy Act was intended to be retrospective, those who had held land of the Malik-makbuzas when the Act came into force for less than 12 years became sub-tenants but those who had held it for 12 years or more had become occupancy tenants and could not be ejected. Plaintiff's suit was therefore rightly dismissed.

With reference to the question whether the Plaintiff is a *Malik-makbuza* or an absolute occupancy tenant, it has been found on evidence that he occupies the former position and I cannot go behind that finding.

The next question is as to the position of the Defendant Respondent whether he is a tenant or a Subtenant. The operation of the amendment which was effected by Section 12, Act XVII of 1889 in Section 51 of the Tenancy Act was doubtless intended to be retrospective and those who held as ordinary tenants

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* This was a second appeal from the decision in appeal by the Civil Judge Hoshangabad. The suit was originally decided by the Extra-Assistant Commissioner Hoshangabad.

when the amendment came into force became Sub-tenants. I think however, that it is clear, reading Sections 41 and 51 of the Tenancy Act together, 1st that it was possible to acquire occupancy rights as a tenant of *Malik-makbuza* land before the Tenancy Act came into force and 2ndly that where those rights existed even the amended Section 51 did not disturb them.

On the face of that Section it is only "a tenant *who is not* an absolute occupancy tenant or *an occupancy-tenant* and who holds land——————from a Malik-makbuza" who is a Sub-tenant. I am confirmed in my view by the judgment of my learned predecessor, Mr. Neill, in an unreported case, Raghubar Prasad and Janki Prasad, a minor through Raghubar Prasad, Appellants *vs.* Lachman Chowdhari Respondent, second appeal No. 35 of 1891, decided on the 4th 1891. In that case the Plaintiffs Appellants desired to eject the Defendant Respondent as a Sub-tenant. My learned predecessor held that the question whether the Defendant in that case was a Sub-tenant or not depended upon whether he was or was not an occupancy-tenant within the meaning of Section 41 of the Tenancy Act:—"in other words, had the Defendant held those fields continuously for 12 years on the 1st January 1884?" There is a reported case also in V. C. P. L. R. 110, which was decided on the same principle, though negatively. Now in the present case it has been found as a fact that the Defendant Respondent had had more than 12 year's continuous occupation of the land in dispute on the 1st January 1884, when the Tenancy Act came into force. The Courts below have therefore rightly held that he had acquired a right of occupancy and that he could not be ejected as a Sub-tenant.

This appeal is dismissed with costs.

Counsel for Appellant—Messrs. Fraser and Dick Barristers-at-law.

„ *for Respondent—Mr. Balwant Rao Advocate.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 642 of 1891.*

Decided on 24th March 1892.

Sujanmal, Sheodass ..... Plaintiffs.
Mt. Bhagabai, Ganoba, Yeshwantrao and others } Defendants.

[Supplement to N. S. 17—8—1892.]

In this case there had been a private partition by metes and bounds, some years ago, of a village and the possession of the different shares remained with the co-sharers to whom they were respectively allotted until some of them interfered with the arrangement by suing some of the Plaintiffs tenants. The Plaintiffs sued for a declaration that certain fields specified in the plaint should be declared to be their separate fields and that possession of those fields should be given to them. Held that Sections 136 and 152 of the Land Revenue Act do not bar this suit as there was no question of suing or applying for the partition of a mahal, nor is there any question of the distribution of the land or allotment of the revenue of a mahal by partition.

The case of the Plaintiffs was that there had some years ago been a private partition by metes and bounds of a village of which they were co-sharers as *Malguzars* and that possession of the different shares remained with the persons to whom they were respectively alloted until some of the Defendants interfered with the arrangement by suing some of the Plaintiffs tenants. The Plaintiffs sued for a declaration that certain fields specified in the plaint should be declared to be their separate fields and that possession of those fields should be given to them.

* This was a Second appeal from the decision in appeal by the Deputy Commissioner Wardha. The suit was originally decided by the Extra-Assistant Commissioner Wardha.

The contention was raised by the Defendant that the suit was not cognizable by the Civil Court having regard to Section 136 c of the Central Provinces Land Revenue Act, 1881, and the first Court decided that it was not cognizable, though it also disposed of the suit on the merits.

On appeal the Lower Appellate Court held that the case was not cognizable by the civil Courts in view of Section 136 *(c)* of the Land Revenue Act and also in view of Section 152 (*a*) with special reference to sub-section (*b*) clause (13 *a*). It accordingly summarily dismissed the appeal without entering into the merits of the case.

I am clearly of opinion that the Lower Appellate Court was quite wrong in its view. There is no question at all in this case of suing or applying for the partition, perfect or imperfect, of a *mahal*, nor is there any question of the distribution of the land, or allotment of the revenue of a *mahal* by partition. The Plaintiffs do not ask that any sort or kind of partition or distribution be made. What they say is that there has been by private arrangement such a division of the lands comprised in the *mahal* that each co-share has had separate possession of those lands until some of the Defendants disturbed the possession of them, the Plaintiffs, and they ask that possession may be restored to them and that their right to separate possession may be declared.

So far is this from being a suit for partition or distribution of the lands, that it must fail at once, if it be found, as the first Court found, that the private division alleged by the Plaintiffs is not proved, for the whole case rests upon that alleged private division.

The appeal is remanded for trial on the merits. Costs will follow the result. The Court fee on the memorandum of appeal will be refunded.

Counsel for Appellant—Mr. Balwant Rao Advocate.
Respondent—absent though served.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Civil Revision No. 9 of 1892.*

Decided on 28th April 1892.

Krishna Rao Amrit Buty.....Plaintiff.

Raghunath Sadashiv, Sambhu Lalba and Amirkhan ...*Defendants.*

Appellate Courts have power to return plaints for presentation in the proper Courts.

The applicant asks for revision of the appellate decree of the Deputy Commissioner of Wardha on two grounds. It appears that the Plaintiff now applicant for revision, instituted a suit in the Court of the Naib-Tehsildar and after that Court had dismissed his suit appealed on the ground that it had not jurisdiction and ought to have returned the plaint for presentation in the proper Court. The Deputy Commissioner considered that he had no power to pass an order in appeal directing the return of the plaint;—He set aside the decree of the first Court as made without jurisdiction, but refused to order the plaint to be returned for presentation in the proper Court, merely placing it on record that there was no bar under Section 13 Code of Civil Procedure to the institution of a fresh suit. He saddled the Plaintiff appellant with the costs of the appeal.

* This was a civil revision from the decision of the Deputy Commissioner Wardha. The suit was originally decided by the Naib-Tahsildar of Wardha.

It is now objected 1st that the Appellate Court ought to have returned the plaint for presentation in the proper Court and 2ndly that it ought not to have saddled the Plaintiff appellant, now applicant, with costs.

The Deputy Commissioner does not appear to have been aware that the jurisdiction of an appellate Court to return a plaint for presentation in the proper Court has been repeatedly recognised. I refer to the cases in I. L. R. 7 Cal. 157 and I. L. R. 9 Bom: 266 as instances in which this procedure was adopted. In the Bombay case the order was passed in second appeal on the ground that it ought to have been passed by the Lower Appellate Court.

As regards the question of costs, the Plaintiff now applicant, has no cause of complaint. It is the practice in cases of this kind to impose the costs on the party who was to blame for the mistake.

The decree of the Deputy Commissioner will be so far varied that the words "Let the plaint be returned to the Plaintiff appellant for presentation in the proper Court" shall be added to the relief already granted.

The applicant will bear all costs in this Court.

Appellant—Agent.

Respondents—Sadashiv and Sambho present in person others absent.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, Ot S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 694 of 1892.*

Decided on 8th July 1892.

Govindrao, Sadashiv Rao and Nilkant Rao } *Plaintiffs.*

Bapu deceased sons Dhondia, Ishna and Sitaram minor through Janki and other } *Defendants.*

A Malguzar who purchases a malik-makbuza holding is not a malik-makbuza of that holding after the purchase.

The question for decision in this case is whether a Malguzar who has purchased a *malik-makbuza* holding is a *malik-makbuza* of that holding after the purchase. This question was decided by me in a case reported in C. P. L. R. 82; but I had not on that occasion the advantage of hearing arguments and I have now heard what the learned Pleader for the Appellant has to urge against the view which I then took. His contention is that as the *malik-makbuza* is recognised by Section 137, Act XVIII of 1881 as a proprietor, his status is not inferior to that of a *Malguzar* and as merger can only take place when the right which merges is inferior to that into which it merges, there can be no merger of a *malik-makbuza* right into a right as *malguzar*.

* This was a second appeal from the decision in appeal by the Deputy Commissioner Bhandara. The suit was originally decided by the Extra-Assistant Commissioner Bhandara.

[Supplement to N. S. 7—9—1892.]

I think it can not be said that merely because a *malik-makbuza* is recognised as a proprietor, therefore his status is necessarily equal to that of a *malguzar*. The *malguzar* is the proprietor of the whole of the *mahal*, including the *malik-makbuza lands* that may be included within it. The *malguzar* is responsible for the revenue payable on account of the *malik-makbuza* lands and provisions such as those of Section 64, Act XVIII of 1881 seem plainly to recognise the superiority of this status to that of the *malik-makbuza*. Moreover I am still unable to see how it is possible with reference to the definition of the term *malik-makbuza* in Section 4 Sub-section (10) of the Act that the same person should be *malguzar* and *malik-makbuza* in the same *mahal* at the same time. On the whole, then, I do not see sufficient ground to alter the view which I have already expressed on this question.

The appeal is dismissed with costs.

Counsel for Appellant—Mr. A. K. Chowdhari Advocate.

„ *for Respondent—Mr. Balwant Rao Advocate.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 125* *of* 1892.

Decided on 12*th July* 1892.

Joharuddin and Kamaruddin minors through guardian mother Umrao Bi ...*Plaintiffs.*

Kesheorao Mahadeo..... *Defendant.*

In this case an occupancy tenant mortgaged his occupancy right in a field to another person with the consent of the Malguzar. The mortgagee, before the death of the tenant, obtained a foreclosure decree. The tenant died without heirs. The Malguzar thereupon sued to oust the mortgagee who was in possession of the field under his foreclosure decree. Held that by consenting to a mortgage other than a usufructuary one, a Malguzar consents by implication to foreclosure. When the mortgagor of an occupancy right dies before foreclosure the mortgagee's interest would cease altogether with that of the mortgagor. The case is widely different, however, where foreclosure takes place before the death of the mortgagor, and while his right subsists The right becomes transferred in such a case by the foreclosure just as it would be by a voluntary sale by the tenant with the consent of the Malguzar; and the subsequent death of the tenant can no more affect the one transaction than the other.

One Sheik Chand with the consent of the Malguzar mortgaged his occupancy right in the field in question in this case to the Defendant Respondent, who before the death of Sheikchand obtained a foreclosure decree. Sheikchand died without heirs, so that in the ordinary course his occupancy right would have lapsed. The

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* This was a second appeal from the decision in appeal by the Civil Judge Wardha. The suit was originally decided by the Extra-Assistant Commissioner Wardha.

Plaintiffs Appellants have taken a sort of speculative lease of the field in question from the Court of Wards, which now represents the Malguzar, and they sue to oust the mortgagee, who is now in possession under his foreclosure decree.

The first Court decreed the claim, holding that the interest of the mortgagee necessarily ceased on the death of the tenant mortgagor, because the interest of the tenant himself ceased at that time.

The view of the Lower Appellate Court is that the consent by a Malguzar to a mortgage necessarily implies consent to all the consequences of the mortgage, including foreclosure, and it has reversed the decree of the first Court.

I think that it is only reasonable to hold that by consenting to a mortgage other than an usufructuary one a Malguzar consents by implication to foreclosure, for otherwise the mortgage is practically no security at all. At the same time there could be no foreclosure after the cessation of the interest of the mortgagor, which would occur on his death. If, therefore, the mortgagor of an occupancy right died before foreclosure, the mortgagee's interest would cease altogether with that of the mortgagor. The case is widely different, however, where foreclosure has taken place before the death of the mortgagor and while his right still subsisted. The right becomes transferred in such a case by the foreclosure just as it would be by a voluntary sale by the tenant with the consent of the Malguzar and the subsequent death of the tenant can no more affect the one transaction than the other. Whether the tenant lives or whether he dies his right has been transferred in the one case by the foreclosure and in the other by the sale, so that so far as he is concerned there is nothing left to lapse on his death.

It has been contended that as the Malguzar was not made a party to the foreclosure suit, he can not be affected by the decree with reference to Section 85 of the Transfer of Property Act, 1882. I think that there is nothing in this contention. The Malguzar had not, I think, an interest in the right of occupancy within the meaning of Section 85 and the mortgage with all its incidents was binding as against him, because he had given his consent to it in accordance with the requirements of the Tenancy Act.

The appeal is dismissed with costs.

Counsel for Appellant—Mr. Fraser, Barrister-at-law.

„ *for Respondents—Mr. B. K. Bose, Advocate*

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APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 147* *of* 1892.

Decided on 21*st July* 1892.

Miran Pinjara..... *Plaintiff.*

Ramasa and Ghisia..... *Defendants.*

The Defendant in this case took an unregistered mortgage of the property in dispute on the 5th July 1885, its registration being optional. The Plaintiff purchased the property by a registered deed of sale on the 13th of April 1889. The Defendant obtained decree on the mortgage bond on the 22nd July 1889. The Plaintiff sued to have the priority of his registered bond established. Held that as under Section 47 of the Registration Act the operation of the registered documents as against unregistered documents takes effect from the moment of their execution, the prior unregistered deed ceases to operate as regards the property comprised therein from the date of the subsequent registered deed. A decree afterwards obtained on the document which has ceased to operate cannot revive its operation. The "decree or order" contemplated by Section 50 Act III of 1877 does not mean a decree or order obtained on the unregistered document subsequently to the execution of the registered instrument.

But where the purchaser under a subsequent deed of sale with full notice of a prior unregistered encumbrance, of which the registration was optional, cannot claim as against a mortgagee under the unregistered mortgage deed. The dictum of equitable estoppel applies.

The present case turns upon the question of the priority of registered instruments under the provisions of Section 50, Act III of 1877.

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* This was a second appeal from the decision in appeal by the Deputy Commissioner Nimar. The suit was originally decided by the Extra-Assistant Commissioner Khandwa.

The facts so far as it is necessary to state them for the purposes of this judgment, are as follows:—The 1st Defendant now Appellant, Ramasa, took an unregistered mortgage of the property in dispute on the 5th July 1885, registration being optional. The Plaintiff Respondent purchased the property by a registered deed of sale on the 13th April 1889. The 1st Defendant Appellant obtained a decree on the mortgage-bond on the 22nd July 1889. The Plaintiff Respondent has now sued to have the priority of his registered bond established.

Two points have been argued for the Appellant *viz.* 1st that though his decree was subsequent to the registered deed of sale, it should in accordance with the provisions of Section 50 of the Registration Act have priority over the deed of sale, and 2ndly that the Lower Appellate Court was wrong in holding that it was immaterial whether the purchaser by the registered sale deed had notice of the previous unregistered mortgage or not.

The only authority which has been cited for the Appellant on the first point is the ruling reported in I. L. R. 7 All. 888. There is a ruling of the Madras High Court in the contrary sense reported in I L. R. 6 Mad. 88, which was referred to by the Court of first instance and by the Lower Appellate Court in the Allahabad case, but was not noticed by the Allahabad High Court in its judgment.

I am bound to say that the reasoning of the Madras High Court commends itself to me. It is that as under Section 47 of the Registration Act the operation of registered documents as against unregistered documents takes effect from the moment of execution, the prior unregistered deed ceases to operate as regards the property comprised therein from the date of the subsequent

registered deed, and a decree afterwards obtained on the document which has ceased to operate can not revive its operation. It is pointed out in the judgment that if it were otherwise, it would be only necessary to put the unregistered document in suit to defeat the provision of Section 50 of the Registration Act in favour of registered documents. The Allahabad High Court merely refers to the words in Section 50, "not being a decree or order," and holds that they are conclusive. It is worthy of remark that though the facts were similar in the case in I. L. R. 11 Cal. 667, to which I shall presently refer for another purpose, that case was decided in favour of the holder of the unregistered document, not because he had obtained a decree upon it subsequently to the execution of the registered deed (though such was the case;) but because the holder of the registered instrument had notice of the prior unregistered deed. I agree, then, with the Lower Appellate Court in holding that the "decree or order" contemplated by Section 50 Act III of 1877 does not mean a decree or order obtained on the unregistered document subsequently to the execution of the registered instrument.

As to the second point the balance of authority is strongly against the decision of the Lower Appellate Court. In addition to this Court's ruling reported in Vol. V C. P. L. R. 97, I may mention the following authorities which, doubtless, were in the mind of my learned predecessor who decided that case: I. L. R. 8 All. 540, I. L. R. 10 Bom. 105, I. L. R. 11 Cal. 667, I. L. R. 13 Cal. 70. In an earlier Calcutta case reported in I. L. R. V. Cal. 336 also priority in respect of a subsequent registered deed over an unregistered one is restricted to the case of innocent subsequent purchasers without notice. The obvious ground on which this current of rulings rests is that it would be fraudulent in the subsequent purchaser to take and register a conveyance in prejudice to the known title of another and the Courts will not

assist the perpetration of fraud. The Lower Appellate Court has not decided whether when the deed of sale of the 13th April 1889 was executed, the Plaintiff now Respondent had or had not notice of the mortgage deed of the 5th July 1885. As this is the question on which the decision of the case hinges, I must send the appeal back to the Lower Appellate Court for a finding upon it.

The case is remanded for a finding on the above point, to be submitted to this Court within three weeks of this date. The parties will have 7 days from the receipt of the finding to make any objections which they may be entitled to make.

Counsel for Appellant—Mr. Balwant Rao Advocate.

Respondent—Miran present in person; other Respondent absent though served

Supplement to N. S. 21—9—1892.]

APPEAL JUDGMENT.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 148* *of* 1892.

Decided on 21*st July* 1892.

Basora and Mt. Saropa..... Plaintiffs.

Jugal Kishore, Bharatsing and Tulsiram } ...*Defendants.*

Under Section 61 of the Tenancy Act, collateral relatives of an ordinary tenant can not claim to be co-sharers by the mere fact of their assisting in the actual cultivation of the land, even if they received a portion of the produce for their pains. The term 'co-sharer' implies an interest of the same kind as that of the tenant.

This is a case in which the devolution of ordinary tenancy is in question. It is governed by Section 61 of the Tenancy Act. The Plaintiffs Respondents claim as collateral relatives and co-sharers of the deceased tenant. The Courts below have held that they are co-sharers, because the deceased tenant was an old man and one of them lived with him and managed his cultivation for him. I think that this decision is clearly wrong. The Plaintiffs Respondents were not made co-sharers by the mere fact of their assisting in the actual cultivation of the land, even if they received a portion of the produce, for their pains. The term 'co-sharer' implies an interest of the same kind as that of the tenant. Thus, if two collateral relatives are interested in the same manner as

* This was a second appeal from the decision in appeal by the Deputy Commissioner Jabalpur. The suit was originally decided by the Extra-Assistant Commissioner Jabalpur.

tenants each to the extent of one-half in an ordinary holding under the provisions of Section 61 of the Tenancy Act on the death of one of them the other may inherit his right and have the whole of the holding.

The appeal is decreed with costs throughout. The decrees of the Courts below are reversed and the claim of the Plaintiffs Respondents is dismissed.

Counsel for Appellant—Mr. Dick, Barrister-at-law.
Respondent—Basora present in person, Mt. Sarupa absent though served.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S,

Officiating Judicial Commissioner, C. P.

Second Appeal No. 155* *of* 1892.

Decided on 27th July 1892.

Khoshal Chowdhry..... Plaintiff.

Nanhu and Ghanashiam.....Defendants.

The question in this case is whether the Defendants Respondents were tenants of the land which they have been holding from the Plaintiff Appellant as bataidars. Held that where the land-lord himself takes a part in the cultivation, the person associated with him therein and who gets a share of the produce as his remuneration is not ipso facto a tenant. On the other hand where a land-lord does not take part in the cultivation, but merely lets certain land to a person on condition that the latter should deliver to the former a proportionate share of the produce, the person to whom the land is let, is a tenant.

The question in this case is whether the Defen-

* This was a second appeal from the decision in appeal by the Deputy Commissioner Chhindwara. The suit was originally decided by the Assistant Commissioner Chhindwara.

dants Respondents were tenants of the land which they have been holding from the Plaintiff Appellant as *bataidars*. It has been contended that on the authority of this Court's Ruling reported in III C. P. L. R. 180 a *bataidar* is not a tenant. Now it appears from the judgment in that very case that the question whether a *bataidar* is a tenant or not depends upon the circumstances of the particular case. It is clear that, as my learned predecessor said in that judgment, "when the land-lord himself takes a part in the cultivation, the person associated with him therein and who gets a share of the produce as his remuneration is not *ipso facto* a tenant. On the other hand it is equally clear, as was laid down in the unpublished judgment referred to in that case, that where a land-lord does not take part in the cultivation, but merely lets certain land to a person on condition that the latter should deliver to the former a proportionate share of the produce, the person to whom the land is let is a tenant. According to the findings in this case it was the latter state of things that prevailed and therefore the Defendants Respondents were tenants.

The appeal is dismissed with costs.

Counsel for Appellant—Mr. Balwant Rao Advocate.

„ *for Respondent—Mr. Dillon Barrister-at-law.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S,

Officiating Judicial Commissioner, C. P.

Second Appeal No. 86 of 1892.*

Decided on 6th May 1892.

Tikaram Sao..... Plaintiff.

Laldas Bairagi.....Defendant.

In the absence of any special reservation the Malguzar has the same rights over the buried bricks and stones that Government would have had, if it had not settled the proprietary rights in the lands with him.

In this case the Appellant who is a *Malguzar*, sued the Respondent for the value of certain old bricks and stones dug up from the buried mines of an old village within the mahal of which the Appellant has the proprietary rights.

The Lower Appellate Court found that the Respondent had removed such bricks and stones to the value of Rs. 150; but dismissed the claim on the ground that the *Malguzar* had no property in them.

The word "land" is not defined in the Land Revenue Act (No. XVIII of 1881;) but in its usual legal acceptation it includes that which is above and that which is below the surface of the soil according to

* This was a second appeal from the decision in appeal by the Civil Judge Bilaspur. The suit was originally decided by the Extra-Assistant Commissioner Bilaspur.

[*Supplement to N. S.* 28—9—1892.]

the well-known maxim **Cujus est solum ejus est usque ad cœlum et ad inferos.* The *Malguzar* would have a right to the bricks and stones, unless such right had been reserved by the Government or unless they came within the definition of "treasure trove" in Act VI of 1878. By Section 151 Act XVIII of 1881 it is provided that "unless it is otherwise expressly provided in the records of a Settlement, or by the terms of a grant made by the Government, the right to all mines, minerals, coals and quarries and to all fisheries in navigable rivers shall be deemed to belong to Government." There is no other reservation and old bricks and stones forming part of a buried ruin do not appear to come within the description of "mines, minerals, coals and quarries." They clearly are not "treasure trove" within the meaning of the term in Act VI, of 1878, Section 3 of which defines it as "any thing of any value hidden in the soil or in any thing affixed thereto." It is clear from Sections 7 and 8 of the Act that by the word "hidden" is meant not merely "incapable of being seen from the surface," but intentionally concealed."

I think, then, that in the absence of any special reservation the *Malguzar* has the same rights over the buried bricks and stones that Government would have had, if it had not settled the proprietary rights in the land with him.

The appeal is decreed. The decrees of the Courts below are reversed. The claim of the Plaintiff Appellant is decreed to the extent of Rs. 150 with costs on that amount throughout. The Respondent will get his costs throughout on the amount for which the claim has been dismissed.

Counsel for Appellant—Mr. B. K. Bose, Advocate.
Respondent—In person.

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* Whose is the soil, his it is even to heaven and to the middle of the earth.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Miscellaneous Appeal No. 16* *of* 1892.

Decided on 19*th August* 1892.

Ghularam Ramchandra..... *Plaintiff.*

Kesheo Ramchandra.....*Defendant.*

** The Defendant who was a tenant was ejected under the provisions of Sub-section 2 of Section 72 of Act IX of 1883 for non-payment of the arrears of rent. In the execution of this decree it was contended for the Defendant that the ejectment operated as a complete satisfaction of the decree for arrears. Held that the decree for the arrears was not satisfied by the ejectment under Section 72 of the present Tenancy Act.*

The Appellant is a tenant who has been ejected under the provisions of Sub-section 2 of Section 72 of Act IX of 1883. The decree-holder now seeks to execute his decree for the arrear of rent. It is contended for the Appellant that the ejectment operated as a complete satisfaction of the decree for arrears. No authority has been produced for this proposition and I agree with the Courts below in rejecting it. Under the provisions of Section 78 of Act X of 1859, the rent law which was replaced by Act IX of 1883, a land-lord wishing to eject a tenant for non-payment of arrears of rent could sue for ejectment and for recovery of the arrear in the same action, or could adduce an unexecuted decree for arrears of rent as evidence of the exis-

* This was a miscellaneous appeal from the decision in appeal by the Civil Judge Chanda. The suit was originally decided by the Tahsildar of Chanda.

tence of such arrears in a suit for ejectment. In either case if the amount of the arrear with interest and costs of suit was paid into Court within fifteen days from the date of the decree, ejectment did not take place. Unquestionably the decree for the arrear was not satisfied by the ejectment under the provisions of Section 78 of Act X of 1859 and Section 72 of the present Act seems merely to be a modification of those provisions. I can find nothing in it to lead to the inference that the ejectment is to be in substitution of the satisfaction of the decree for arrears of rent.

The appeal is dismissed with costs.

Counsel for Appellant—Mr. Balwant Rao Advocate.

Respondent—By a Khas Mukhtyar by name Alaf Khan.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S,

Officiating Judicial Commissioner, C. P.

Second Appeal No. 39* *of* 1892.

Decided on 3rd May 1892.

Tukaram..... *Plaintiff.*

Dowla..... *Defendant.*

Whether a person holds a village-service holding as a Sub-tenant under the village service tenant or whether he holds it directly from the Malguzar, he is liable to ejectment, but so long as the office remains for the remuneration of which the holding was created, the holding must remain in his possession. A Malguzar could not let it to any other person.

But under proviso (b) of Section 41 of the Tenancy Act occupancy rights cannot be acquired in respect of village service holding.

I think that the Lower Appellate Court is clearly right in holding that whether, as the first Court finds, the Defendant Appellant holds as a Sub-tenant under the village service tenant, or whether, as the case of the Defendant Appellant himself is, he holds and has long been holding directly from the *Malguzar*, he is liable to ejectment from what has been proved to be a village-service holding. It is quite clear from Chapter IV A of the Tenancy Act that so long as the office remains for the remuneration of which the village-service holding

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* This was a second appeal from the decision in appeal by the Deputy Commissioner Nimar. The suit was originally decided by the Extra-Assistant Commissioner Khandwa.

was created, the holding must remain in the possession of the person holding that office and a *Malguzar* could not let it to any other person. It is also clear from proviso (*b*) of Section 41 of the Act that occupancy rights cannot be acquired in respect of village-service holdings.

The appeal is dismissed with costs.

Counsel for Appellant—Mr. C. V. Naidu, Barrister-at-law.

„ *for Respondent—Mr. B. K. Bose, Advocate.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 352* *of* 1891.

Decided on 30*th June* 1892.

Dauji Alaspuri.....Plaintiff.

1 Punjaji 2 Yeshwantrao and 3 Balaj.Defendants.

Where the usual endorsements of presentation and admission of execution were signed by the Registering Officer and the deed was entered in the Register book and where the certificate of registration was written but was not signed by the Registering Officer, held that this omission to sign was fatal to the validity of the registration, under Section 61 of the Registration Act.

The first point that I have to decide is whether or not the document on which the Plaintiff Appellant sued was duly registered. It appears that the usual endorsements of presentation and with respect to admission of execution were signed by the Registering Officer and that the deed was entered in the Register book kept for the purpose. The certificate of registration was written, but was not signed by the Registering Officer. The question is whether this omission to sign was a defect of procedure within the meaning of Section 87 of the Registration Act, or whether it was fatal to the validity of the registration. I am inclined to take the latter view. From Section 61 of the Registration Act it appears that the mere copying of a deed into the

* This was a second appeal from the decision in appeal by the Deputy Commissioner Wardha. The suit was originally decided by the Extra-Assistant Commissioner Wardha.

Register-book does not amount to registration. Registration is not deemed to be complete until the certificate of registration has been first signed, sealed and dated by the Registering Officer and then copied into the margin of the Register-book. A case has been cited, reported in Indian Law Report I Allahabad, 473 in which registration was held not to be invalid because the signatures of parties had not been taken to the endorsements. This case seems to me to be of a very different kind. The signature of Registering Officer on the certificate of registration seems to be that which gives validity to the whole proceedings in just the same way that the signature of the presiding Officer of a Court gives force to a warrant or a decree. Every necessary condition may be fulfilled in the drawing up of a decree, but until it is signed, it has no force. I think then, that there has not been any complete registration of the document now in question and admittedly the appeal must fail on that ground.

Appeal dismissed with costs.

Counsel for Appellant—Mr. B. K. Bose, Advocate.

" for Respondent—Mr. Atmaram Bhagwant Pleader.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 124* *of* 1892.

Decided on 8th July 1992.

Madho Vishwanath..... *Plaintiff.*

Mt. Kashi Bai minor guardian father Rangrao } ...*Defendant.*

The Plaintiff Appellant in this case claimed the village in dispute on the ground of self-acquisition. At the last Settlement the uncles of the Plaintiff claimed to have their names entered in respect of the whole village on the ground of the surrender by the Plaintiff's father of his one-third share. The Plaintiff's father acquiesced in the claim of his brothers, but it was resisted by the Plaintiff in defence of his own interests. Held that Plaintiff's action in resisting the claim of his uncle does not constitute such a recovery as legally amounts to self-acquisition.

The Plaintiff Appellant sues the widow of his deceased brother for that brother's share on two grounds:—1st that under circumstances which I am about to notice the whole of the share in the village in question left by their late father, comprising the share now in the Plaintiff Appellant's possession and also that which is the subject of this suit, was the self-acquired property of him, the Plaintiff Appellant, and 2ndly that his late brother and himself were undivided and therefore he takes his brother's share.

* This was a second appeal from the decision in appeal by the Civil Judge Nagpur. The suit was originally decided by the Extra-Assistant Commissioner Nagpur.

[Supplement to N. S. 12—10—1892.]

The second ground has not been argued in this Court.

The claim of self-acquisition is founded on the alleged recovery by the Plaintiff Appellant of the whole of the share in the village in question in respect of which his late father's name was entered at the time of the Settlement. It appears that at the time of the Settlement the two uncles of the Plaintiff Appellant claimed to have their names entered in respect of the whole village on the ground of the surrender by the Plaintiff Appellant's father of his one-third share. The Plaintiff Appellant's father, it appears, acquiesced in the claim of his brothers; but it was resisted by the Plaintiff Appellant himself in the defence of his own interests. The question is whether his action in resisting the claim of his uncles, so that in the end his father's name was at his instance entered by the Settlement Officer in respect of the one-third share, entitles him to claim the whole of that share as his self-acquired property. I think the Lower Appellate Court is quite right in holding that it does not. No authority has been shown to me for holding that there was such a recovery as legally amounts to self-acquisition. On the other hand it is quite obvious that the action of the Plaintiff Appellant does not come within the description in the following passage of the Mitakshara which deals with the subject of self-acquisition by recovery. "Any property which had descended in succession from ancestors and had been seized by others and remained unrecovered by the father and the rest through inability or for any other cause he among the sons who recovers it with the acquiescence of the rest shall not give up to the brethren or other co-heirs; the person recovering it shall take such property." Mitakshara Chapter I, Section IV Plac 2.

The appeal is dismissed with costs.

Counsel for Appellant—Mr. Balwant Rao, Advocate.

for Respondent—Mr. Bapu Rao Dada, Pleader.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 137* *of* 1892.

Decided on 15*th July* 1892.

Seth Nanheylal through Dalchand... Plaintiff.

Dinanath and Beharilal..... Respondents.

In order to the creation of an occupancy right in land which had been, but had, when Act IX of 1883 came into force ceased to be, sir-land, it is necessary that the tenant should occupy the land for at least twelve years after it had ceased to be sir-land.

The question which I have to decide in this appeal is whether under the provisions of Section 41 of the Tenancy Act a tenant who when that Act came into force had continuously for more than twelve years held land which at the time of the introduction of the Act was not *sir-land* but had lost its *sir* character at some time within that period of 12 years, became an occu-

* This was a second appeal from the decision in appeal by the Civil Judge Hoshangabad. The suit was originally decided by the Extra-Assistant Commissioner Hoshangabad.

pancy tenant. It has been argued for the Respondent that because the wording of the proviso to Section 41 is "provided that the land *is* not (*a*) *sir*-land &c.," the intention of the Legislature must have been that only such land should be excluded under that portion of the proviso from the operation of the Section as was actually *sir* at the time when the Act came into force. I cannot admit the correctness of this interpretation. As long as *sir*-land remains *sir*, no length of occupation could ever create occupancy rights in it and it seems to me that it would have been strange indeed had the intention of the Legislature been to permit a time during which the tenant held under an absolute disqualification for the time being from acquiring occupancy rights to commit towards the period necessary to establish those rights when the disqualification should cease by the land's ceasing to be *sir*. I think that the more reasonable interpretation is that in order to the creation of an occupancy right in land which had been, but had, when Act IX of 1883 came into force ceased to be, *sir*-land, it was necessary that the tenant should have occupied the land for at least twelve years after it had ceased to be *sir*-land.

I must therefore decree this appeal; but as the learned Advocate for the Respondents consents on behalf of his clients to pay the enhanced rent demanded from them, the agreement is recorded and there will be no decree for ejectment.

The Respondents will pay the Appellant's costs throughout.

Counsel for Appellant—Mr. Balwant Rao, Advocate.

" *for Respondent—Mr. B. K. Bose, Advocate.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 257 of 1892.*

Decided on 15th September 1892.

Punjaji, Sudarshan Rao and Manohar Rao minors through guardian Mt. Mana Bai } *Plaintiffs*

Beharilal Golabchand and others...Defendants.

A tenant of an absolute occupancy holding mortgaged it without notice to the land-lord although the proportion which the sum for which the mortgage was made bore to the rent of the holding was such that without such notice the transaction was void as against the land-lord under the provisions of Sub-section (7) of Section 38 of the Tenancy Act. The land-lord brought a suit for possession against the mortgagee who was in possession under a mortgaged decree. Held that the land-lord was entitled to possession.

The tenant of an absolute occupancy holding mortgaged his holding without notice to the land-lord, although the proportion which the sum for which the mortgage was made bore to the rent of the holding was such that without such notice the transaction was void as against the land-lord under the provisions of Sub-section (7) of Section 38 of the Tenancy Act. The mortgage is alleged by the land-lords to have been made without their knowledge and they sue for possession against the mortgagee who is in possession under the foreclosure decree.

* This was a second appeal from the decision in appeal by the Deputy Commissioner Chhindwara. The suit was originally decided by the Assistant Commissioner Chhindwara.

I think that, as was said by my learned predecessor who tried the case reported in V. C. P. L. R. 65, in a case of this kind the decree founded on a mortgage which was *ab initio* of no effect against the land-lord must be treated as being equally of no effect against him. It seems to me that on a reasonable construction the foreclosure mentioned in Sub-section (5) of Section 38 must be taken to be foreclosure of such a mortgage as would be of effect as against the land-lord. Under a more general construction the provisions of Sub-section (7) would be altogether inoperative as regards mortgages of which under Sub-section (2) notice ought to have been, but had not been given, if only the transaction could be concealed from the land-lord until foreclosure was obtained. It is very difficult to believe that this can have been intended by the Legislature. There is no hardship in a case of this kind. The provisions of Sub-section (2) read with Sub-section (7) of Section 38 are quite clear and if any person chooses to take a mortgage of an absolute occupancy holding without satisfying himself that notice has been given to the land-lord, where notice is necessary, he has only his own folly to thank if he is disappointed in the result of his transaction.

The appeal is dismissed with costs.

Counsel for Appellant—Mr. B. K. Bose, Advocate.

" *for Respondent—Mr. Balwant Rao, Advocate.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 272 of 1892.*

Decided on 22nd September 1892.

Mt. Chunna Bai..... Plaintiff Appellant.

Kamarali, Himmatali and Mohafizali } ...*Defendants Respondents.*

A suit is maintainable when based on a private agreement made out of Court in satisfaction or adjustment of a decree without the sanction of the Court.

Section 257 A was intended simply to prohibit the enforcement of an agreement of the kind mentioned therein in execution of the decree.

The Plaintiff Appellant held a decree against the Defendant Respondent Kamarali. The Plaintiff Appellant has now sued on a bond executed by Kamarali and by the other two Defendants Respondents, partly in satisfaction of the old decree and partly for new advances. The execution record has been destroyed, so that it is impossible to ascertain from any authoritative source whether or not the adjustment was reported to and sanctioned by the executing Court under the provisions of Section 257 A of the Code of Civil Procedure. Oral evidence was given in the first Court that the adjustment was reported to the executing Court in the receipt on the strength of which that execution case was

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* This was a second appeal from the decision in appeal by the Deputy Commissioner Chhindwara. The suit was originally decided by the Assistant Commissioner Chhindwara.

removed from the file on the ground of complete satisfaction; but the first Court did not consider it safe to rely on that evidence. The Courts below have therefore dismissed the claim of the Plaintiff Appellant so far as the amount which the Defendants Respondents bound themselves to pay in adjustment of the decree is concerned, holding that the agreement was void under Section 257 A of the Civil Procedure Code.

So far as the Defendants Respondents other than the original judgment-debtor Kamarali are concerned, I should not in any case have been able to affirm the decision of the Courts below, looking to the rulings reported in I. L. R. VI Mad. 101 and I. L. R. XIII Bom. 672, which lay down that Section 257 A applies only as between the parties to the suit and decree.

I think, however, that I must go further and hold that a suit is maintainable when based on a private agreement made out of Court in satisfaction or adjustment of a decree without the sanction of the Court. The Bombay High Court, which had till then held the contrary, ruled this in a case reported in I. L. R. XV Bom. 419 on the ground of the amendment made in Section 258 of the Civil Procedure Code by Section 27 Act VII of 1888, though it left open the question whether Section 257 A relates exclusively to agreements to extend the time for enforcing decree by execution, as ruled by the High Court of Calcutta, or whether that Section is applicable to all agreements according to the view which had been previously taken by itself.

I feel myself much pressed, not only by the ruling to which I have just referred, but by that of the High Court of Calcutta reported in I. L. R. XVI Cal. 504, which dissented from the previous rulings of the Bombay High Court and held that Section 257 A was intended "simply to prohibit the enforcement of an agreement of

the kind mentioned therein in execution of the decree." I am aware that this view is opposed to that expressed by one of my learned predecessors in a case reported in I C. P. L. R. 70, but that case was decided before the passing of Act VII of 1888 and my learned predecessor then remarked that he was not aware that any of the High Courts had held that a bond which falls within the terms of Section 257 A is void only as regards the execution of a decree.

The appeal is decreed with costs throughout. The claim of the Plaintiff Appellant is decreed in full.

Counsel for Appellant—Mr. Bapu Rao Dada, Pleader.

" *for Respondent—Mr. C. V. Naidu, Barrister-at-law.*

[*Supplement to N. S.* 16—11—1892.]

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APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 314* *of* 1892.

Decided on 7th November 1892.

Fakira..... *Plaintiff.*

Hari and Anandi..... *Defendants.*

A Hindu widow has no right to dispose, as she pleased, of a holding of which she has been recorded as occupancy tenant if she has inherited it from her husband. The words "shall devolve as if it were land" in Sections 38 and 43 of the Tenancy Act imply that the devolution is to be regulated (subject to the restriction in Section 43 as regards collateral heirs) by the personal law of succession which governs the persons concerned.

In the present case a reversionary heir seeks to set

* This was a second appeal from the decision in appeal by the Civil Judge Nagpur. The suit was originally decided by the Extra-Assistant Commissioner Nagpur.

aside a gift of an absolute occupancy holding made by a Hindu widow and by her daughter-in-law to his prejudice. The daughter-in-law may be left out of the question, as she is not alleged to have had any title to the holding. As regards the widow the Lower Appellate Court has held that the ordinary Hindu Law does not apply and that a Hindu widow would have a right to dispose as she pleased of a holding of which she had been recorded as occupancy tenant, whether or not (as I understand) she had inherited it from her husband. This view appears to me incorrect. I have twice recently held that the words "shall devolve as if it were land" in Sections 38 and 43 of the Tenancy Act imply that the devolution is to be regulated (subject to the restriction in Section 43 as regards collateral heirs) by the personal law of succession which governs the persons concerned. The fact that there is no provision in the Tenancy Act corresponding to the second paragraph of Section 87 of the Land Revenue Act seems to me to be altogether immaterial. If it had been intended to be possible that a widow inheriting an absolute occupancy holding from her husband should obtain such an interest in it as to enable her to alienate it to the prejudice of her husband's next male heir, the law would never have provided that the occupancy right should "*devolve as if it were land.*"

The question does not appear to have come before this Court in its present form until recently; but in a case reported in II C. P. L. R. 167 it was held that the title of an heir to succeed to an occupancy holding could not be defeated by the present owner of the holding leaving it to another person by will even with the consent of the *Malguzar*.

The fact is that the decision of the question whether or not the gift was valid in the present case depends entirely on that whether she succeeded to it as the pro-

perty of her late husband, whose heir the Plaintiff Appellant claims to be.

It is strange that although considerable stress seems to have been laid on this point in the pleadidgs on both sides, the first Court did not fix any issue upon the subject.

The case must go back to the Lower Appellate Court for inquiry and a finding on the issue whether the occupancy holding in dispute was acquired by Mt. Sakhu herself or whether she succeeded to it as the property of her late husband. Any evidence that it may be necessary to take may be taken by the first Court, if that course is most convenient.

The finding and evidence are to be returned to this Court by the 20th December next. The parties will be allowed 10 days from the date of the receipt of them to file any objections which they may be entitled to make.

Counsel for Appellant—Mr. C. V. Naidu, Barrister-at-law.

„ *for Respondent—Mr. B. K. Bose, Advocate.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 356 of 1892.*

Decided on 1st November 1892.

Mt. Salita.....Plaintiff.

Sitaram Zamidar.....Defendant.

An occupancy tenant died leaving a minor son, a daughter, and a widow. The minor son who had inherited the holding also died without issue and his mother succeeded him. On the death of the widow, the Malguzar, the Defendant Respondent in this case, took possession of the holding and has now been sued for possession by the daughter. Held that when a woman succeeds to an occupancy right, she does so subject to the personal law by which she is governed and the character of her interest will vary accordingly.

In the present case the widow, who succeeded to her son, took only for her life in accordance with the ordinary Hindu Law of inheritance and the daughter has no right to the tenancy, because she is only collateral relative of her brother, who was the last full heir.

An occupancy tenant died leaving a minor son, a daughter and a widow. On his death the minor son was entered as tenant in his stead, though it appears that in consequence of his youth the widow actually managed the cultivation. On the death of the son without issue the widow succeeded and was recorded as tenant. On the death of the widow the Malguzar, the Defendant respondent in this case, took possession of the holding and he has now been sued for possession by the daughter, the present Plaintiff appellant.

* This was a second appeal from the decision in appeal by the Civil Judge Hoshangabad. The suit was originally decided by the Extra-Assistant Commissioner Hoshangabad.

A very elaborate and interesting argument has been addressed to the Court by Mr. Dillon, the gist of which is that it is impossible to conceive of an occupancy right which should not be a complete right and that a woman who succeeds to such a right must therefore succeed to it completely as if she were a male heir. It has been argued as if the Tenancy Act were complete in itself as regards the devolution of tenant rights and the ordinary personal law of the parties had no application.

I am quite clear that this position is unsound. Section 43 of the Tenancy Act provides that when an occupancy tenant dies, his right in his holding shall devolve as if it were land. The only exception to this general rule,—that which excludes all collateral relatives, unless they were at the time of the tenant's death co-sharers in the holding, obviously does not widen, but on the contrary narrows the right of succession. It is plain, then, that when a woman succeeds to an occupancy right, she does so subject to the personal law by which she is governed and that the character of her interest will vary accordingly. In the case of a Hindu woman the question of devolution cannot be affected by the mere facts that during her life-time she is recorded and recognised as the tenant of the holding to which she has succeeded and that the tenancy is during her life-time liable to the same incidents as it was in the time of the last male owner. Thus in the present case the widow, who succeeded to her son, took only for her life in accordance with the ordinary Hindu Law of inheritance and the daughter has no right to the tenancy, because she is only a collateral relative of her brother, who was the last full heir.

The appeal is dismissed with costs.

Counsel for Appellant—Mr. Dillon, Barrister-at-law.

" for Respondent—Mr. B. K. Bose, Advocate.

[*Supplement to N. S.* 23—11—1892.]

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 4 of 1892.*

Decided on 1st November 1892.

Jawahirsing minor through Mt. Baro...Plaintiff.

Mohanlal, Dhanpat and Rupchand...Defendants.

In a suit by a son to set aside an alienation by the father of ancestral property on the ground that the alienation was for the satisfaction of immoral debts, it was held that in cases of this kind it is necessary for the son to prove that the debts for the satisfaction of which the alienation was made, were incurred for immoral purposes.

This is a suit by a son to set aside an alienation by the father of ancestral property on the ground that the alienation was for the satisfaction of immoral debts. Evidence was adduced before the first Court to show that the father was of dissolute character and that he had spent some money on prostitutes and gambling. The Lower Appellate Court does not say that it disbelieves those witnesses; but it considers that the difficulties which resulted finally in the alienation in question were the result of general extravagance and as no connection has been attempted to be proved between the debts which were satisfied by the alienation and any immoral expenditure, it holds that the Plaintiff's case must fail.

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* This was a second appeal from the decision in appeal by the Commissioner Jabalpur Division. The suit was originally decided by the Deputy Commissioner Seoni.

It has now been contended in appeal for the Plaintiff that it is sufficient to show that the father was addicted to immorality of an expensive nature and in support of this contention the cases reported in I. L. R. XIII All, 216 and IV C. P. L. R. 29 have been cited.

I do not feel at all pressed by either of those rulings. In both cases it was found as a fact by the Court whose decision was under appeal that the money had been borrowed for immoral purposes and all that this Court ruled was that where money was borrowed for immoral purposes by the father, it was not necessary for the son to trace out the items of expenditure and prove them. It is perfectly clear that to entitle the son to succeed in the present case it was necessary for him to prove that the debts for the satisfaction of which the alienation was made were incurred for immoral purposes and the Lower Appellate Court is supported by a judgment of the Bombay High Court in I. L. R. XIV Bom. 320, in which a previous ruling of the same Court and one of the High Court of Allahabad are followed, in its view that in cases of this kind some connection must be shown between the debt and the father's immoralities. I am not prepared to differ from that view.

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This appeal is dismissed with costs.

Counsel for Appellant—Messrs. Dillon and Fraser Barristers-at-law.

" *for Respondent—Mr. Mendes Barrister-at-law and Messrs. B. K. Bose and Balwant Rao Advocates.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Civil Revision No. 59° *of* 1892.

Decided on 3rd November 1892.

Seth Moriram and Parmanand } ...*Decree-Holder Petitioners.*

Daryao Kirar, Brijlal } ...*Judgment-Debtor opposite party.*

Where after a decree had been confirmed in appeal an application was made to the Court of first instance to amend the decree under the provisions of Section 206 of Civil Procedure, on the ground that it was not in conformity with the judgment, held that as the decree to be amended is the decree to be executed and as the decree of the first Court has been superceded by that of the Appellate Court, the latter decree only can be amended and it cannot be amended except by the Court which made it.

It appears that after a decree had been confirmed in appeal, an application was made to the Court of first instance to amend the decree under the provisions of Section 206 of the Code of Civil Procedure on the ground that it was not in conformity with the judgment. The Court of first instance held that it had no jurisdiction to amend the decree after it had been confirmed by the Appellate Court. It accordingly referred the applicant to the Appellate Court. The Appellate Court held that the Court of first instance was wrong in its

° This was a civil revision from the decision in appeal the Judicial Assistant to Commissioner Nerbada Division. The suit was originally decided by the Deputy Commissioner Narsingpur.

view it had not jurisdiction to make the amendment and suggested that this Court should be moved to interfere by revision.

The fact is that there is a conflict of authorities on the subject. The Madras High Court has ruled in the case reported in I. L. R. IX Mad. 354, and the Calcutta High Court has ruled in the case reported in II B. L. R. 363, that where the decree has been affirmed in appeal the Court of first instance has jurisdiction to amend it. The High Court of Allahabad at one time entertained a similar view; but a full Bench of that Court has decided in two cases, reported respectively in I. L. R. II All. 267 and 314, that the decree to be amended is the decree to be executed and as even when the decree of the first Court has been upheld, it has been superseded by the decree of the Appellate Court, the latter decree only can be amended and it cannot be amended except by the Court which made it.

I think that the view of the Allahabad High Court is correct and that it is for the Appellate Court to amend the decree.

The case will go back to the Court of the Judicial-Assistant to the Commissioner for disposal of the application for amendment on its merits. The costs of this application will follow the result of the application to the Judicial-Assistant to the Commissioner.

Counsel for Appellant—Messrs. Balwant Rao Advocate and Hemchandra Nandan Pleader.

„ . *for Respondents—Mr. N. K. Bose, Advocate.*

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 210* *of* 1892.

Decided on 1st November 1892.

Bajirao Patel..... *Plaintiff.*

Paika Patel..... *Defendant.*

The fact of a dasi's having been previously married does not disqualify the son begotten on her by a Shudra from inheriting under the Hindu Law.

On the death of the father, the dasiputra was entitled to half the share of a legitimate son and if the latter pre-deceased the dasiputra without leaving male issue, the dasiputra would take the whole estate by survivorship.

A dasi means and includes any unmarried mistress of a Shudra class.

A father can not disinherit a dasiputra.

The Plaintiff Respondent is the illegitimate son of a Sudra by a woman who has been found by the Courts below to have been a kept woman, or continuous concubine. The first Court regarded her as an unmarried woman, as having been merely kept as a concubine by the man with whom she had previously lived; but the Lower Appellate Court observes that apparently she must have been married to that man, because after his death she sued for and obtained his property. It is said that the father before his death executed a deed of gift of all his property in favour of the Defendant Appellant,

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* This was a second appeal from the decision in appeal by the Judicial-Assistant to the Commissioner Nagpur Division. The suit was originally decided by the Extra-Assistant Commissioner Nagpur.

who was his son by a *pat* wife. The first Court found that this deed of gift had not been really executed and also held that it was invalid in any case, not having been followed by possession. The Lower Appellate Court has held that the Plaintiff is a *dasiputra*, or son begotten by a *Súdra* on a female slave, and thus comes within the purview of Chapter I Section XII of the Mitakshara. I do not understand the Lower Appellate Court to find that the deed of gift was not in fact made; but it holds that the gift was not valid for want of transfer of possession and the learned Judicial Assistant to the Commissioner further observes that in any case he would feel a difficulty as to its validity, because it does not appear that a father would be able to disinherit a *dasiputra*. The Courts below have given the Plaintiff Respondent a decree for a one-fourth share in the property left by the father.

Of the questions raised for the Appellant in the present appeal the first is whether the Plaintiff's mother can on the facts found by the Lower Appellate Court be held to have been a *dasi* (*a*) in view of the strict meaning of that term and (*b*) as having been married to another man before she was kept by the Plaintiff's father.

It is not here a question, I may observe at once, of the Plaintiff's having been begotten in adulterous intercourse, but whether the term *dasi* in its less restricted use necessarily implies that the person described by it should never have been married.

Professor Jolly at page 187 of his learned volume Tagore Law Lectures on the History of the Hindu Law of partition, inheritance, and adoption has the following observations:—

"As for the modern controversies, the first and "most important one concerns the meaning of *dasi*. It

"has been contended in a Bengal decision that it means "'a female slave' in the strictest sense of that term, "and slavery having been abolished under British Rule, "it would follow that the whole law under notice is "obsolete. It is quite certain, however, that the com- "mentators and sastris have persistently explained the "term *dasi* as including any unmarried female of the "Sudra caste." He goes on to refer to a remark of Kamalakara in the Vivadatandava that the text of Manu on the subject, in which the word *dasi* is used, "refers to the son begotten by a Sudra on an unmarried "Sudra female." He also quotes from the ancient commentary of Medhatithi on Manu the proposition, that "the term 'a Sudra's son by a *dasi*' means a son be- "gotten by him on a woman neither married to him nor "authorised to raise offspring (according to the custom "of Niyoga.") The fact is that the High* Court of Calcutta stands entirely alone in its interpretation of the term *dasi* and that there is a current (I believe uniform) of rulings of the High Courts Bombay,† Madras‡ and Allahabad§ accepting the wider meaning noticed by Dr. Jolly. In the unpublished decision of this Court referred to by the Lower Appellate Court (Gurdayal and others *vs.* Mt. Kota, second appeal No. 248 of 1890) the wider interpretation of the term was recognised and considering the preponderance of authority in its favour I feel no hesitation in adopting it in the present case.

We have next to see what is meant by "an unmarried woman of the Sudra caste." In the judgment of the Bombay High Court reported in I. L. R. I Bom. 97 it appears to have been considered that the authors of the Dayabhaga and the Vyavahara Mayukha con-

* I. L. R. I Cal. I, I. L. R. XIX Cal. 91.
† I. L. R. I Bom. 97, I. L. R. IV Bom. 37.
‡ IV M. H. C. R. 204 and 284, I. L. R. VII Mad. 407.
§ I. L. R. II All. 134.

curred in thinking that the woman should never have been married to any man and reference is made to a note to placitum, 28 Chapter IX of Colebrooke's translation of the Dayabhaga, in which on the authority of Srikrishna the expression "unmarried in that placitum is explained as not married to any one; but kept for sensual gratification." It is immediately afterwards added in the judgment that "the condition that "the Sudra woman should never have been married to "any man has in practice.....been discarded in "the Presidency of Bombay."

Three cases have been cited as authority for the proposition that the woman must never have been married at any time; they are reported respectively in IV M. H. C. R. 204, I. L. R. VII Mad. 412, and I. L. R. VIII All. 387. I do not find any of these cases but the first (and that not very strongly) support the Appellant's case. The first has reference to an incestuous, and the last to an adulterous connection. In the remaining case the words "unmarried Sudra woman" are used without explanation. It cannot, I think, be contended that the word *dasi* in itself is applicable only to women who have never been married at all. The whole question is what meaning is to be attached to the word "unmarried," which, by the way, is not found in the Mitakshara text at all. We have to choose between two interpretations; it denotes either one who has never been married at all or one who is not married to the father of the son. On general principles it seems difficult to understand why in the case of a female slave or concubine any difference should be made between one who had never been married at all and a woman who had been married and whose marriage tie had been dissolved. It is not even as if the distinction were between a woman who had come to her keeper a virgin and one who had previously lost her virginity. It would certainly seem strange enough in a case like the present to in-

sist that the mother of the illegitimate son should never have been married before, while recognising the position of the other son by a *pat* wife.

It seems to me that the real distinction is between a woman who is married to the father of the son and one who is not so married. This is clearly the case with respect to the passage in placitum 28 of Chapter IX of the Dayabhaga, to which the note to which I have already referred in Colebrooke's translation relates. Two passages are quoted in that placitum; one from Vrihaspati, the other from Manu. The latter speaks of "a son begotten through lust on a Sudra woman." Then Jimutavahana proceeds:—"These (two) passages imply that the Sudra woman is unmarried, for a husband is enjoined to approach his wedded wife once in the proper season, and conception takes place then only, not on subsequent intercourse." It seems to be possible that in the annotation the expression "not married to *any one*" is not intended to be equivalent to "not married at all," but really means "not married to *a person*," *i. e.* the person who begets the son. The antithesis is between "married" and kept for sensual gratification."

Whether this be so or not, I am unable to see any room for doubt that, as I have said the passage to which the annotation refers simply distinguishes between a woman not married to the person who begets a son on her and his wedded wife. If we go on to placitum 31, which deals with the respective rights of the son by a female slave or unmarried Sudra woman (or accepting the translation of Mitter J. of placitum 29 in the case reported in I. L. R. I Cal. I, "the son of a Sudra by an unmarried female slave etc.") and the son of a daughter, we find that they are to take equal shares by a sort of compromise, because each has a point of superiority over and also one of inferiority to the other, "since the one, "though born of an unmarried woman, is son of the

"owner, and the other, though sprung from a married "woman, is only his daughter's son." Here it seems plain that the distinction between the son of the unmarried woman and the son of the "married woman" is that the one is not born in wedlock, while the other is, the mother of the former not being married to his father, while the mother of the legitimate son is married to that son's father. It is manifest that so far as this distinction goes it would be perfectly immaterial whether or not the mother of the illegitimate son had ever been married before. Again the illegitimate son is said to have a right of inheritance, not because his mother was an "unmarried woman;" but in spite of that fact, on the ground that he is the "son of the owner." In other words his being the son of an "unmarried woman" is not stated as a qualification for inheritance, but as a disqualification, which, however, is held to be counterbalanced by his superiority in the matter of nearness of consanguinity to the propositus. If we turn to the Vyavahara Mayukha (Chapter IV, Section IV pages 46 and 47 of Mr. Mandlik's translation, Bombay, 1880) we find that the author leads up as follows to the subject of the *dasiputra* begotten by a Sudra. He first deals with the question of partition among the sons of one father by different wives. He quotes from Yajnavalkya a rule for the partition among sons by mothers of different classes.

(i) Sons of a Brahman by a Brahman, Kshatriya Vaisya or Sudra wife;

(ii) The sons of a Kshatriya by Kshatriya, Vaisya or Sudra wife:

(iii) the sons of a Vaisya by a Vaisya or Sudra wife.

He then quotes Vrihaspati as authority for the precept that land obtained by a Brahman by acceptance of a gift should on no account be given to the sons of

a Kshatriya or other wife of an inferior class. He next proceeds to deal with the rights of sons by Sudra wives and (quoting Devala) says that they cannot obtain a share of land; but that they do obtain a share of moveable property. He then leaves altogether the subject of sons born in wedlock and deals with that of illegitimate sons. Having said that the son begotten by a twice-born man on a Sudra wife obtains a share of moveable property, he goes on to say:—"However, "the son by an unmarried Sudra woman does not ob- "tain a share even of moveable property," quoting a passage from Manu which makes it clear that he refers to the illegitimate son of a Brahman, Kshatriya or Vaisya man by a Sudra woman.

Now I cannot but think that it is quite clear that here the author of the Mayukha uses the word "unmarried" in the sense of not married to the father of the son? He deals first, as we have seen, with the respective rights of sons by *wives* of different classes and after noticing the case of the son of a twice-born man by a Sudra *wife* he passes at once by an easy transition to the case of the son of a man of any of the three superior classes by an *unmarried* Sudra woman. After noticing that a pratiloma son, that is a son begotten on a woman of a class superior to that of the begetter, is to have maintenance, as in the last mentioned case, he goes on to say:—"Yajnavalkya states "a distinction as regards a son begotten on an un- "married woman: A son begotten on a *dasi* by a "Sudra becomes even partaker of a share by the "father's choice" &c. He then observes as follows:— "The expression *sudrena* (by a Sudra) shows that a "son begotten by a twice-born on a *dasi* does not take "a share even by the father's choice." I confess that I am unable to see any reason why the word "unmarried should be interpreted in one way in the passage dealing with the rights of a son begotten by a man

of one of the three higher classes on an unmarried Sudra woman and in another way in the passage immediately introducing Yajnavalkya's precept as regards a son begotten by a Sudra on a *dasi*. In the former passage it seems clear that the word is used with reference to the father of the son and I cannot see why a more general meaning should be attached to it in the second passage, which is I think merely a continuation of the same subject, namely, the rights of sons of women who are not married to the fathers of those sons. The author states two classes of cases in which such sons are entitled only to maintenance. He then mentions a third class as being distinguished "by Yajnavalkya the dis-"tinction lying in this: that sons who come within this "third class are entitled, not to mere maintenance, but to a share at the father's pleasure during his life-time and a one-half share after his death. This distinction, he goes on to say, does not apply where the father is a twice-born.

I think, then, that it cannot be said that either Jimutavahana or Bhatta Nilkantha is authority for the proposition that the *dasi* on whom the Sudra should beget a son capable of inheriting his property or a share of it must never have been married at all. Medhatithi in his comment on the original text of Manu to which I have already referred says that "a Sudra's son by a *dasi*" means a son begotten by him on a woman *neither married to him* nor authorised to raise offspring. Neither the Mitakshara nor the text of Yajnavalkya suggests the condition that the woman should never have been married at all. The distinction in placitum 2, Section XII, Chapter I of the Mitakshara is between the sons of the *dasi* and those of the wedded wife. In the circumstances I hold that the fact of a *dasi's* having been previously married does not disqualify the son begotten on her by a Sudra from inheriting.

The next question that has been raised in argu-

ment in this appeal is whether under Chapter I, Section XII of the Mitakshara the *dasi's* son can inherit ancestral property. This question has been settled in the affirmative by their Lordships of the Privy Council in a case reported in I. L. R. 18 Cal. 151, affirming a decision of the Calcutta High Court reported in I. L. R. II Calcutta 702, which followed a well-known Bombay Full Bench case, reported in I. L. R. IV Bom. 37 (Sadu *vs.* Baiza and Genu.) It was held in this last case that there was a co-parcenary between a legitimate son and a *dasiputra* who survived their common father, that on the death of the father the *dasiputra* was entitled to half the share of a legitimate son and that if the latter predeceased the *dasiputra* without leaving male issue, the *dasiputra* would take the whole estate by survivorship.

I have finally to consider the question of the operation of the deed of gift said to have been executed by the father in favour of the Defendant to the exclusion of the Plaintiff. In the first place I am not prepared to differ from the Lower Appellate Court in its view that the gift was incomplete for want of transfer of possession. The learned Advocate for the Defendant Appellant has referred me to a Privy Council case reported in I. L. R. II Cal. 121; but there is, I think, a wide distinction between that case and the present one. In that case the donor supported the gift and the objection was taken by a person who claimed adversely both to the donor and to the donee. The view of their Lordships was that the reason why delivery was necessary according to the texts was that the gift might not be resumed. In the present case the validity of the gift is impeached by a person who claims under the donor.

In the second place I do not think that the father could disinherit the son. There is an incedental expression of opinion in the case to which I have already

referred, reported in I. L. R. II Cal. 702 (at page 714) that "a *dasiputra* is not entitled to participate in the "inheritance except at the pleasure of his father;" their Lordships of the Privy Council did not in their judgment notice the question whether the father could disinherit his *dasiputra* and indeed the point did not at all arise in the case. The view expressed by the Bombay High Court in the case in I. L. R. IV Bombay 37 at page 54 was that in Chapter I Section XII of the Mitakshara the author, Vijnyaneswara, was dealing with two different matters: "first with partition in the father's life-time, "when it depended on the pleasure of the father whe- "ther the son of the female slave took a full share or "less; secondly with the right of the son of the female "slave on the death of the father." This is substantially the view of Medhatithi in his commentary on the original text of Manu, as quoted by Dr. Jolly at page 187 of his Tagore Lectures. "Such a son shall receive "an equal share with a legitimate son, if his father "wills it so and either divides his property in his life- "time, or enjoins his legitimate sons to share equally "with the illegitimate son after his death. If the father "has made no such provision for the illegitimate son, "he shall take after the father's death half of the share "allotted to each legitimate son." The whole of the law on the subject is so anomalous, that even if it were held that a *dasiputra* could not compel partition during his father's life-time (a point that yet remains undecided,) it would not by any means necessarily follow that the father could prevent him from succeeding after the father's death to the moiety of the share of a legitimate son. Altogether, then, I think that the Lower Appellate Court, whose decision, I must remark, was a very careful and well considered one, has rightly disposed of the case.

The appeal is dismissed with costs.

Counsel for Appellant—Mr. B. K. Bose, Advocate.

„ for Respondent—Mr. Dadabhoy, Barrister-at-law.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Second Appeal No. 881* *of* 1892.

Decided on 22*nd November* 1892.

Narainsing..... Plaintiff.

Mt. Rewa and Jagannath..... Defendants.

At the time of Settlement in the year 1868 the proprietary right in the estate in question was conferred upon Mt. Phando Bai and Mt. Rewa Bai, the daughters of one Manikram, with whom the estate had been settled at the previous twenty years Settlement and who had died in the mean time. The two sisters partitioned the estate, each holding a separate eight annas share. Phando Bai, who was a widow, when the interest was conferred upon her at the Settlement, mortgaged her share. The Plaintiff Appellant is the son of Mt. Rewa Bai. He sued for a declaration that the mortgage is void beyond the life-time of Mt. Phando Bai and that he is her heir.

Held that in accordance with the provisions of the second paragraph of Section 87 of the Central Provinces Land Revenue Act 1881, the rights conferred upon Phando Bai at the Settlement were those only which under the Hindu Law she would enjoy in land inherited by her from her husband and that by implication those rights must at her death devolve upon the husband's heir or heirs.

Though in practice hereditary claims were recognised to a very great extent, the actual rights were not inherited, but were conferred at the Settlement.

It appears that at the time of the Settlement in the year 1868 the proprietary right in the estate in question was conferred upon Mt. Phando Bai and Mt. Rewa Bai the daughters of one Manikram, with whom

* This was a second appeal from the decision in appeal by the Judicial-Assistant to Commissioner Jabalpur and Nerbada Divisions. The suit was originally decided by the Deputy Commissioner Mandla.

the estate had been settled at the previous twenty year's Settlement and who had died in the mean-time. The two sisters partitioned the estate, each holding a separate 8 annas share. Phando Bai, who was a widow when the interest was conferred upon her at the Settlement, mortgaged her share. The Plaintiff Appellant is the son of Mt. Rewa Bai. He sues for a declaration that the mortgage is void beyond the life-time of Mt. Phando Bai and that he is her heir.

It is contended that the last full owner of the estate was Manikram, that Phando Bai received at the Settlement a limited interest such as a daughter inheriting from her father would receive and that the heir after her death is the heir to the last full owner.

I think that the Lower Appellate Court has rightly held that in accordance with the provisions of the second paragraph of Section 87 of the Central Provinces Land Revenue Act 1881, the rights conferred upon Phando Bai at the Settlement were those only which under the Hindu Law she would enjoy in land inherited by her from her husband and that by implication those rights must at her death devolve upon the husband's heir or heirs.

There has been in this Court, as there appears to have been in the Lower Appellate Court, an elaborate argument for the Plaintiff Appellant as to the proper interpretation of the provisions of law to which I have referred. It has been contended that what the Legislature really intended to say was, that the interest conferred upon any female heir should be deemed to be such an interest as she would be capable of taking under the personal law to which she was subject. Reference has been made to the fact that in treatises of Hindu Law, like the Mitakshara, the rights of female heirs generally are not dealt with separately from those of widows and it has been contended that doubtless this was in the mind of the framers of the Land Revenue Act. I must say that I cannot believe that if the Legislature had intended to say what it is con-

[Supplement to N. S. 28—12—1892.]

tended that it really meant, it would not have said so in clear and unmistakable terms. There was not the smallest reason that I can imagine for its not doing so. I cannot but hold that when the word "widow" was used "widow" and nothing but "widow" was intended.

It has again been urged that supposing that the word "widow" is to be understood literally, it must have reference to widows on whom proprietary rights were conferred in succession to their husbands. There is nothing at all that I can see in the context to justify this interpretation. It is contended that the Legislature had no intention of changing the ordinary course of succession. This contention assumes that interests were necessarily conferred by Settlement officers in accordance with the law of inheritance by which the persons concerned were governed; but this assumption seems to me to be unjustified. Though in practice hereditary claims were recognised to a very great extent, the actual rights were not inherited, but were conferred at the Settlement. It could not, therefore, I think, be said that a widow on whom rights were conferred in succession to her husband inherited them from him, and similarly in the present case it can not be said that Phando Bai and Rewa Bai inherited from their father the rights which the Settlement officer conferred upon them.

It has been contended that in any case the second para of Section 87 only describes the character of the rights conferred upon the widow and does not regulate the succession to those rights. It is no doubt true that it does not regulate the succession in so many words; but it seems to me that it follows as a matter of course that if the rights of the widow are only those which she would have inherited from her husband, the succession to them must in the absence of some special provision of law to the contrary be regulated by the law which would ordinarily apply to the devolution of property inherited by a widow from her husband. It

is unnecessary in this view to notice the other questions which have been raised in this appeal.

The appeal is dismissed with costs.

Counsel for Appellant—Mr. B. K. Bose, Advocate.

" for Respondent—Mr. Shirishchander, Pleader for Respondent Jagannath and Mr. Hemchander Nandon Pleader for Mt. Rewa.

APPELLATE CIVIL.

Before J. F. Stevens, Esquire, C. S.
Officiating Judicial Commissioner, C. P.
Second Appeal No. 346 of 1892.*
Decided on 25th November 1892.

Yado, Ragho, Balaji and Kashinath.....Plaintiffs.

Anandrao and Amritrao.....Defendants.

The words "no Court shall pass a decree without the production of a succession certificate" in Section IV, Sub-section (1) clause (a) of the Succession Certificate Act, 1889, merely import that "all that can be insisted upon is that the representation shall be complete before decree" and do not make the obtaining of a certificate a "step necessary to enable" a Plaintiff suing in a representative capacity "to institute a suit."

* * * *
* * * *

It appears that on the applicant's filing a plaint as representative of a deceased person the first Court either rejected or returned the plaint (it is not quite clear which) on the ground that a succession certificate had not been filed with it. The applicant appealed and the Appellate Court dismissed the appeal. By the time the applicant had obtained a succession certificate, which has since been filed, the suit became barred by limitation.

I think that the Courts below were in error in holding that a Plaintiff must obtain a succession certi-

* This was a second appeal from the decision in appeal by the Civil Judge Nagpur. The suit was originally decided by the Munsiff of Katol.

ficate as a necessary condition precedent to the institution of a suit against the debtor of a deceased person. Section IV Sub-section (1) clause (a) of the Succession Certificate Act 1889 provides merely that no Court shall *pass a decree* without the production of a succession certificate. These words "pass a decree" are, I have no doubt, to be understood in their simple literal sense. There is no ambiguity or difficulty of construction here and it seems impossible to suppose that if the Legislature had intended to say "entertain a suit" or "investigate a claim," one of those forms of expression would not have been employed.

That the words "pass a decree" are to be taken in their obvious and literal meaning has been recognised by the High Court of Bombay in a case reported in I. L. R. XVI Bom. 519. It is true that in that case it was a question of revising a suit under Section 365 of the Code of Civil Procedure, and not of instituting one: but this makes no difference to the interpretation of Section IV of the Succession Certificate Act. With reference to that provision of law it is said in the judgment of the High Court that "that Act—an Act passed for fiscal "purposes—shows that all that can be insisted upon is "that the representation shall be complete before decree."

I may observe that there is nothing in this view which conflicts with the provisions of the 3rd paragraph of Section 50 of the Code of Civil Procedure, because neither the Succession Certificate Act nor any other law in force makes the obtaining of a certificate a "step "necessary to enable" a Plaintiff suing in a representative capacity "to institute a suit." All then that can be required of such a Plaintiff is that he shall produce the certificate before decree.

The order of the Appellate Court is set aside. The Court of first instance must now admit the plaint as from the date on which it was originally presented. The costs of this application will be costs in the suit.

Counsel for Appellant—Mr. B. K. Bose, Advocate.

„ for Respondent—Mr. Dadabhoy, Barrister-at-law.

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tions of a Civil Court, but to prevent breaches of the peace likely to arise from disputes concerning tangible immoveable property.

Mt. Paikabai *vs.* Jagannath and Rajaram 21

Criminal Procedure Code Sections 421, 423 and 424—An order summarily rejecting an appeal under the provisions of Section 421 of the Code of Criminal Procedure, does not amount to a judgment within the meaning of Section 424 and of the Chapter XXVI. A judgment under Section 424 of the Code implies a trial.

The essential difference between the rejection of an appeal under Section 421 and its dismissal under Section 423 is, that in the latter case the appeal is disposed of after trial, whereas in the former the Court by summarily rejecting it refuses to try it at all.

Every order, however, passed in the exercise of judicial discretion, should show on the face of it, the ground on which it is made.

Empress *vs.* Patiram 24

Criminal Procedure Code Section 123—Security for keeping the peace—Under second para of Section 123 of the Criminal Procedure Code, when a Magistrate orders a person to give security for keeping the peace for a period exceeding one year, all that he could do is to "issue a warrant directing him to be detained in prison pending the orders of the Court of Session" and to send his proceedings to that Court. It is then the duty of the Sessions Court to pass its own order on the proceedings submitted to it, stating the period for which the Court required security to be given and the period for which the prisoner was to be imprisoned for failure to give such security.

Empress *vs.* Rewa Ahir 27

Criminal Procedure Code Section 114—In this case the applicant was arrested under the proviso of Sec. 114 of the Code of Criminal Procedure. He applied to be released on bail but the District Magistrate in whose Court the case was pending refused to pass an order for bail partly on the ground of expediency and partly because the appellant's pleader was unable to show any provision of the Code under which bail could be claimed. *Held* that under Section 496 of the Code of Criminal Procedure bail may be claimed as of right, not only by a person accused of a bailable offence, but by "any person other than a

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APPELLATE CRIMINAL.*

Before R. J. Crosthwaite Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Criminal Revision No. 143* *of* 1882.

Decided on 28*th August* 1882.

Empress vs. 1 Kondu, 2 Sadhu, 3 Sukhu, 4 Sheolal, 5 Baredi 6 Matru and 7 Mansaram.

A Police Officer prosecuting a criminal case should not be examined on oath unless he is called as a witness. If so called he should be allowed to depose only to those facts which he knows and of which he is, in accordance with the provisions of the Indian Evidence Act, a competent witness.

[*Supplement to V. S.* 6—1—1892.]

There are strong grounds for supposing that the accused in treating the complainant as they did were punishing him for a real or imaginary attempt on Must. Phulumt's virtue and I observe that the Commissioner in confirming the sentence has observed that the accused are proved guilty of what (technically at least) is dacoity. The facts that the woman was seen talking to the Mahomedan travellers in the after-

* This was a criminal Revision from the decision in appeal by the Sessions Judge Jabalpur. The case was originally tried by the Deputy Commissioner Mandla.

noon and that one of these men went to her house that night go to show that this was no ordinary robbery but that the villagers suspected the complainant and took their revenge by beating him and making him give up his money. The Magistrate does not from his judgment appear to have considered this view of the case nor has he examined the witnesses as he should have done to ascertain whether it is correct or not. So far as the evidence goes I think the only safe conclusion is that the direct motive of the accused was to punish the complainant for trying to seduce a Brahmin woman and I think the sentence passed is excessive. There is no evidence to show that the complainant received any severe hurt.

I reduce the sentences from sentences of 5 years to sentences of six months rigorous imprisonment. I can not understand why the Magistrate took the statement on oath of the Police Officer prosecuting the case. A public prosecutor is not supposed to give evidence but to conduct the prosecution and it is obviously wrong to make a Police Officer so prosecuting depose on oath to facts which he has learnt from others during an enquiry. A Police Officer or Advocate conducting a prosecution should never be sworn unless he is called as a witness and if so called he should be allowed to depose only to those facts which he knows and of which he is in accordance with the provisions of the Indian Evidence Act, a competent witness. The Commissioner should have noticed this error of the Magistrate.

APPELLATE CRIMINAL.

Before R. J. Crosthwaite, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Criminal Revision No. 150* *of* 1882.

Decided on 25th September 1882.

Empress vs. Murit Rai.

In a trial for murder, there can be no question that the Judge who convicts must do so on a degree of moral certainty as to the guilt of the accused, which in his opinion will justify him in passing the extreme sentence of the law. If he is not so morally certain of the guilt of the accused as to pass such a sentence, he is bound to acquit.

I can not agree with the reasons which the Sessions Judge gives for not passing a sentence of death. If there was any reasonable doubt as to the guilt of the accused he should have been acquitted, and if there was no reasonable doubt, the accused should have been convicted and there was no ground for not passing a sentence of death. In no finding whether on the evidence of witnesses or on the confession of the accused can there be absolute certainty. The witnesses may be giving false evidence or the accused may be making a false confession. If such elements of possible error are to be a reason for not passing a sentence of death, that sentence can never be passed. In this case the Judge had to consider whether the confessions of the accused made at different times before the Magistrate and before some of

* This was a criminal revision from the decision of the Commissioner Chhattisgarh Division.

the witnesses were true, that is whether a reasonable man would be justified in believing them to be true and in acting on that belief. If there remained a reasonable doubt in the mind of the Judge as to the truth of the confessions made by the accused he should have acquitted the accused. There can be no middle course open to a Judge. He can not say that he believes the accused is guilty but does not feel quite satisfied about it and so will not pass a sentence of death. His finding should be based on an equal degree of certainty no matter what sentence is passed. It has been well said that that which is not complete proof, is really no proof at all. In theory the same degree of certainty is required for the proof of all offences no matter what the punishment may be; but in practice Juries and Magistrates will convict in trial cases on evidence which they would not consider sufficient to justify a conviction in serious cases, just as in the ordinary affairs of life men will take action in trivial matters on less grounds than they will in serious matters. In a trial for murder however there can be no question that the Judge who convicts must do so on a degree of moral certainty as to the guilt of the accused, which in his opinion will justify him in passing the extreme sentence of the law. If he is not so morally certain of the guilt of the accused as to pass such a sentence he is in my opinion bound to acquit. There can be no doubt that the accused showed the body of the deceased to the three witnesses and admitted having killed him and this fact strongly confirms the confession made before the Magistrate and in my opinion judging from the record there was no room for reasonable doubt as to the guilt of the accused. The record may be returned with these remarks.

APPELLATE CRIMINAL.

Before R. J. Crosthwaite, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Criminal Revision No. 192* *of* 1882.

Decided on 3rd November 1882.

Daulatsing Police Constable vs. Bapu and Parnia.

[*Supplement to N. S.* 10—4—1892.]

The accused in this case who are Malguzars, refused to assist a police constable who wished to bury the dead-body of a man who had died of cholera, the man having no relatives to do the office, and threatened to punish any one who did so. For this the accused were convicted under Sections 186 *and* 187 *of the Indian Penal Code. Held that to constitute that offence there must be an actual obstruction and not a mere withholding of assistance or inciting of others to withhold assistance.*

There is no law requiring a Malguzar to assist a Police Officer in burying a dead-body.

The facts in this case appear to be as follows:—A police constable wished to bury the body of a man who had died of cholera, the man having no relatives or connexions on whom the office would devolve. The accused who are Malguzars refused to assist him and threatened to punish any one who did so. For this the accused have been convicted of voluntarily obstructing a public servant in the discharge of his public functions, Section 186 Indian Penal Code, and of omitting to assist a public servant when bound by law to give assistance, Section 187 Indian Penal Code. It is very questionable whether burying a dead body under the above circumstances is a public

* This was a criminal revision from the decision of the Deputy Commissioner Seoni.

function of a public officer, but supposing that it is the refusal to assist him and preventing others from assisting him can not in my opinion be held to constitute an obstruction of the Police Officer in the discharge of his duties. To constitute that offence there must be an actual obstruction and not a mere withholding of assistance or an inciting of others to withhold assistance.

Moreover I know of no law which requires a Malguzar to assist a police officer in burying a dead body and the conviction on this ground is in my opinion illegal. The Magistrate does not say why the Malguzars objected to have the man buried and it is possible that the opposition arose from some high handed conduct on the part of the Police Officer, or from his wishing to bury the body in some place where the Malgûzars did not want it buried.

I quash the convictions and direct that the fines if paid be refunded.

APPELLATE CRIMINAL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Criminal Revision No. 35 of 1892.*

Decided on 18th January 1892.

Tukaram vs. Zeli.

[Supplement to N. S. 17—2—1892.]

Where a woman threw cloth which she had been wearing at the time of her confinement after having given birth to an illegitimate child on a person whom she alleged to be its father, held that this did not amount to an offence under Section 298 Indian Penal Code Chapter XV of the Indian Penal Code deals with offences relating to religion and not to castes.

The accused person in this case has been convicted under Section 298 of the Indian Penal Code because she, having given birth to an illegitimate child, went to the house of the person whom she alleged to be its father and threw upon it the cloth which she had been wearing at the time of her confinement. The accused at the trial stated that her act was of common occurence with her caste in similar circumstances. On the other hand the son of the man whom she states to be the father of the child stated in evidence that that act was sufficient to make a man lose his caste.

Whether or not any inmate of the house did in fact lose his caste or ran any risk of doing so as a consequence of the accused person's act, I have no

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* This was a criminal revision from the order of the Honorary Magistrate first class Mr. Gangadhar Rao Chitnavis of Nagpur.

doubt that the Deputy Commissioner who has referred this case for revision is perfectly right in thinking that the act did not amount to an offence under Section 298 of the Indian Penal Code. There is no question in that Section of inquiring caste, but of wounding the religious feelings. The Indian Penal Code does not recognise offences relating to caste, though it recognises offences relating to religion. In the original draft Chapter XV of the Indian Penal Code was headed "of offences relating to religion and caste" and it contained there Sections relating to injuries to caste; but those Sections were deliberately omitted when the Code as finally modified passed into law. The object of the Section of the draft which is identical with the present Section 298 of the Code in force was stated by its authors to be "to allow all fair latitude to religious discussion and at the same time to prevent the profession of any religion from offering under the pretest of such discussion intentional insults to what is held sacred by others."

There can be no doubt that the conviction is bad and must be set aside and the fine if realized, or any portion of it that may have been realized must be refunded.

APPELLATE CRIMINAL.

Before J. F. Stevens, Esquire, C.S.

Officiating Judicial Commissioner, C. P.

Criminal Revision No. 42 of 1892.*

Decided on 23rd January 1892.

Empress vs. Shrawan.

When a person is convicted at one trial of two or more distinct offences, and sentenced to several punishments. Held that it is illegal to direct that the sentences shall run simultaneously. Concurrent sentences are clearly illegal under Section 35 of the Code of Criminal Procedure,

The applicant has been convicted under Sections 409 and 218 Indian Penal Code. He was sentenced by the Court of first instance to one year's rigorous imprisonment under each Section. On appeal the Sessions Judge upheld the conviction, but directed that the sentences should run concurrently. As regards the facts of the case I need only say that they are undisputed and that it seems to me impossible to reconcile them with any theory of the applicant's innocence. I do not think that one year's rigorous imprisonment is by any means an excessive punishment. I am compelled at the same time to interfere formally with the order of the Sessions Judge. Concurrent sentences are clearly illegal under Section 35 of the Code of Criminal Procedure which provides that when a person is convicted at one trial of two or more distinct offences and is sentenced for such offences to

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* This was a criminal revision from the decision in appeal by the Sessions Judge Nagpur. The suit was originally tried by Mr. K. M. Anderson first class Magistrate Nagpur.

the several punishments prescribed therefore, such punishments when consisting of imprisonment or transportation, shall "commence the one after the expiration of the other in such order as the Court may direct." The High Courts of Calcutta and Bombay, I may remark, have both held concurrent sentences to be illegal 7 W. R., 59 Criminal, and I. L. R. 10 Bom. p. 254.

In modification of the order of the Sessions Judge it is ordered that the sentence be reduced to six months under Section 218, to commence the one after the expiration of the other.

APPELLATE CRIMINAL.

Before J. W. Neill, Esquire, C. S.

Judicial Commissioner, C. P.

Criminal Appeal No. 140* *of* 1891.

Decided on 5th December 1891.

Empress vs. Dulzsha.

[Supplement to N. S. 16—3—1892.]

Further enquiry which a District Magistrate may order under Sec. 437 of the C. P. Code is an additional investigation of facts or a reconsideration of the evidence by the Magistrate whose order is set aside or a new enquiry before another Magistrate. There is nowhere any authority for a different Magistrate from the one who originally made the enquiry, taking the record of the evidence recorded by the latter, treating it as recorded by himself, taking a different view of the truthfulness of the witnesses, whose evidence had been recorded, and then proceeding to try and convict the accused on that evidence. Held that such conviction is bad; and that Sec. 350 of the Code will not justify such procedure.

I. L. R. XV Cal. p. 608
Do. X Bom. p. 131
Do. IX All. p. 52

Approved and followed.

In this case the accused was brought before Magistrate who after inquiring into the case discharged him. The District Magistrate acting under Sec. 437 of the Code of Criminal Procedure decided to make further enquiry, took some more evidence but it is very doubtful whether that evidence was admissible and at any rate the District Magistrate convicted the accused mainly on the record of the Magistrate who

* This was a criminal appeal from the decision in appeal by the Commissioner Nagpur Division. The suit was originally tried by the Deputy Commissioner Chanda.

had discharged him. He acted under the powers conferred on him under Section 34 of the Code of Criminal Procedure and passed a sentence which required the confirmation of the Sessions Judge. The Judge caused some additional evidence to be recorded on two points and then confirmed the sentence.

The accused has appealed to this Court. It appeared to me doubtful whether the conviction could be upheld and I therefore directed the Government Pleader to appear in support of it. I do not doubt that the District Magistrate had under Section 437 of the Code power to direct further inquiry or to make further inquiry himself. That a District Magistrate has this power was ruled in this Court's judgment in the case of Empress *vs.* Ramdayal. I do not indeed agree in all the reasoning or in all the conclusions of that judgment but I agree with the majority of the Full Bench of the Calcutta High Court in the case of Haridas Lanyal *vs.* Jamlalla I. L. R. Cal. XV p. 608 in the decision of the Judges of the Bombay High Court in Queen Empress *vs.* Dorabji Hormasji I. L. R. Bom. X p. 131 and in the Full Bench Ruling of the Allahabad High Court in Empress *vs.* Chotu I. L. R. All. IX p. 52. I think that the further enquiry which the District Magistrate may order is in the words of J. Wilson 'an additional investigation of the facts or 'a reconsideration of the evidence by the Magistrate 'whose order is set aside or a new enquiry before 'another Magistrate.' But I nowhere in the Code see any authority for a different Magistrate from the one who originally made the enquiry, taking the record of the evidence recorded by the latter treating it as recorded by himself taking a different view of truthfulness of the witnesses whose evidence had been recorded and then proceeding to try and convict the accused on that evidence. That is practically what has been done in the present case and I think the action of the

District Magistrate illegal and the conviction bad. Section 350 of the Code will in no way justify such procedure. I therefore set aside the conviction and sentence. If the District Magistrate still thinks that further enquiry should be made into the original complaint, he may direct it to be made or make it in a legal manner.

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APPELLATE CRIMINAL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Criminal Revision No. 55 of* 1892.

Decided on 4th February 1892.

Empress vs. Dalbux, Nuthia, Mohbu, Amba, Tulsi and Lakhmichand.

The intention of the Legislature is not that a person called upon to furnish security should be punished for not being able to do so, but the safeguard which the security was intended to provide should be provided by his detention in custody. The term sentence in proceedings of this kind is improper as was pointed out in Cr. Circular No 15. Whether the provisions of the law for requiring security are applicable to minors, the third proviso of Sec. 118 of the Criminal Procedure pointed out.

No person should be directed to be detained in a reformatory simply because he is unable to furnish security.

I agree with the additional Sessions Judge in considering the order of the Deputy Commissioner

* This was a criminal revision from the decision of the District Magistrate Seoni.

absolutely and entirely illegal. The boys affected by it have not been called upon to furnish security and I agree with the Additional Sessions Judge that even if this had been done and if in consequence of their inability to furnish security, an order of detention in prison had been passed under the provisions of Section 123 Code of Criminal Procedure, such an order would not have been a "sentence of imprisonment." The word "sentence" does not appear in that section and its use in the code is confined to orders awarding punishment for an offence or for wilful disobedience to the order of a Court. The intention of the Legislature is not that a person called upon to furnish security should be punished for not being able to do so; but that the safe-guard which the security was intended to provide should be provided by his detention in custody. The impropriety of the use of the term "sentence" in proceedings of this kind was pointed out in para. 4 of this Court's Criminal Procedure Circular No. 15.

I think it right to point out to the additional Sessions Judge that in discussing the question whether the provisions of the law for requiring security are applicable to minors, he seems to have overlooked the third proviso of Section 118 Code of Criminal Procedure.

The order of the Deputy Commissioner directing the detention in a reformatory of the persons whose case has been referred by the Additional Sessions Judge is set aside.

APPELLATE CRIMINAL

Before J. P. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Criminal Revision No. 21 of 1894.

Decided on 16th February 1894.

Empress vs. Bagla Teli.

A retrial should only be ordered in cases of acquittal where the trial has been radically and incurably defective.

This is a reference in order to the revision of an order of acquittal.

It is a standing rule of the High Court of Calcutta not to interfere as a Court of Revision with orders of acquittal. I am not aware of any published judgment giving the reasons for this standing rule, but I presume it to be based on the fact that the Legislature has provided in Sections 417 and 418 of the Code of Criminal Procedure for appeals from acquittals to be preferred under safeguards which do not apply in the case of applications for revision and on the principle that the revisional jurisdiction is an extraordinary jurisdiction, not to be exercised [illegible] of appeal remains. A full Bench of the High Court of Allahabad has ruled that a High Court is competent to revise orders of acquittal and to order a retrial (I. L. R. 9 All. 134). The last para. of Section 439, Code of Criminal Procedure provides that the Court shall not be competent as a court of Revision to convert a finding of acquittal into one of conviction. This provision seems clearly to indicate that [illegible]

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*This was a criminal reference by the District Magistrate of Mandla under Section 438 Criminal Procedure Code.

not intended that the provisions of Section 417 should be practically nullified by giving the High Courts powers of Revision in cases of acquittal concurrent and coextensive with the powers which they can exercise in such cases as Courts of appeal.

Accepting the view taken by the High Court of Allahabad in the case above referred to, I think it remains to be seen how the power of directing the retrial in cases of acquittals should be exercised. It seems to me that a retrial should only be ordered in circumstances similar to those in which it would be ordered in the case of a conviction, that is, as I understand, when the trial has been radically and incurably defective, so that even the taking of additional evidence will not suffice to put the appellate or revisional Court in a position to dispose satisfactorily of the case. I can scarcely think it possible that it can have been contemplated that a retrial should be directed merely because the Court directing it differs from the conclusions arrived at by the Court which held the original retrial. It seems to me that where the only ground on which an order of acquittal is called in question is that it is erroneous in law or in fact, the proper remedy is plainly that an appeal should be preferred from that order with the object of having it reversed. There can be no necessity of retrying a case which has already been sufficiently inquired into and I think that to order a retrial in such a case would be improper not merely as a matter of form, but as unnecessarily harassing the parties and the witnesses concerned.

In the present case the inquiry cannot, I think, be said to have been insufficient and the only ground of reference is that the order of acquittal was an order erroneous in law with reference to the evidence and even to the finding on facts arrived at by the Magistrate. I think that this is not a case for retrial, but for rever-

sal of the order of acquittal and I therefore decline to interfere by revision.

Let the papers be returned.

APPELLATE CRIMINAL.

Before J. F. Stevens Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Criminal revision No. 64 of 1892.*

Decided on 22nd February 1892.

Empress vs. Mt. Kashi, Sheik Ramzan and 6 others.

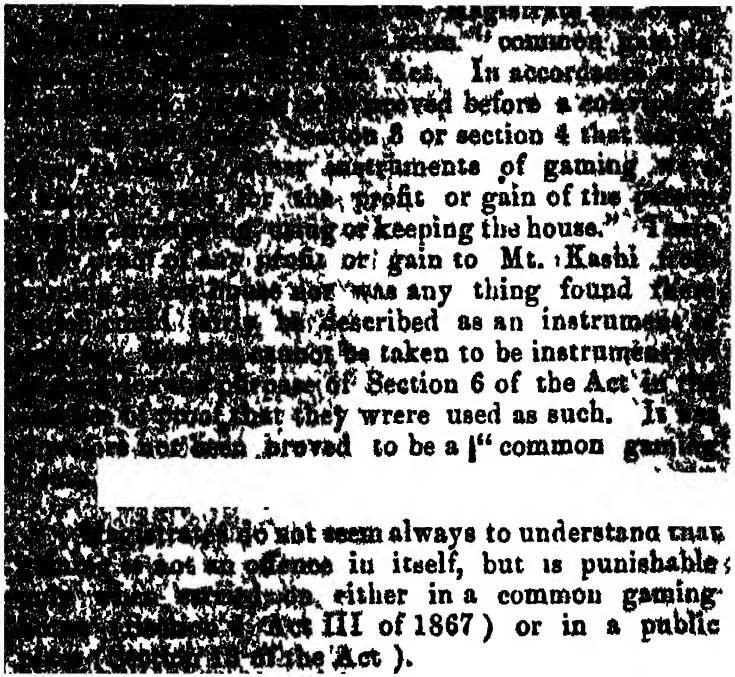
Before a conviction could be had under Section 3 or Section 4 of Act IV of 1867, it should be proved that cards, dice, tables, or other instruments of gaming were "kept or used for the profit or gain of the person owning, occupying, using, or keeping the house."

Cowries can not be taken to be instruments of gaming for the purpose of Section 6 of the Act.

The applicant Kashi has been convicted under Section 3, Act III of 1867 of owning a common gaming house.

The other applicants have been convicted under Section 4 of the same Act of having been found in a common gaming house.

* This was a criminal revision from the order of Mr. Vithal-Raw Magistrate 1st Class, Betul.



Act. In accordance
proved before a
section 3 or section 4 that
instruments of gaming
for the profit or gain of the
keeping the house." There
profit or gain to Mt. Kashi
but was any thing found
described as an instrument
be taken to be instrument
of Section 6 of the Act
they were used as such. It
proved to be a "common gaming

do not seem always to understand that
not an offence in itself, but is punishable
either in a common gaming
Act III of 1867) or in a public
of the Act).

is set aside. The fines if realized,
may have been realized must

APPELLATE CRIMINAL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Criminal Revision No. 119* *of* 1892.

Decided on 30*th March* 1892.

Empress vs. Pearey and Nanhu.

The words "the same offence" in Section 3 of the Whipping Act (No. VI of 1864) are to be construed literally. An offence punishable under Section 457 Indian Penal Code is, therefore, not "the same offence" as one punishable under Section 380 of the Code. The sentence of whipping passed in addition to imprisonment under Section 457 Indian Penal Code on an accused who was previously convicted under Section 380 Indian Penal Code was consequently illegal.

ORDER.

The accused Piarey in this case has been convicted under Section 457 Indian Penal Code and has been sentenced under the provisions of that Section read with Section 4 of Act VI of 1864 to 6 month's rigorous imprisonment and also to a whipping of 30 stripes. It appears on the face of the Magistrate's judgment that there was no previous conviction under Section 457 Indian Penal Code, but that the previous conviction was under Section 380 Indian Penal Code. It has been held by the High Courts of Calcutta, Bombay and Madras that the words "the same offence" in Section 3 of Act VI of 1864 (which is the Section applicable, and not Section 4 as cited by the Magistrate) are to be construed literally. An offence punishable

* This was a criminal revision from the order of the Tahsildar and Second Class Magistrate Narsingpur.

under Section 457 Indian Penal Code is therefore not "the same offence" as one punishable under Section 380 of the Code.

The passing of a sentence of whipping in addition to imprisonment is thus illegal. As the whipping has already been inflicted, it would be a mere mockery to set that part of the sentence aside and the only course open to me is to set aside the sentence of imprisonment, as the whipping alone could be legally inflicted under Section 2 Act VI of 1864.

The sentence of imprisonment is set aside. The accused Piari must be at once released.

APPELLATE CRIMINAL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Criminal Revision No. 251* *of* 1892.

Decided on 11*th July* 1892.

Mt. Paikabai vs. Jagannath and Rajaram.

In disputes regarding immoveable property under Section 145 Code of Criminal Procedure, a Magistrate has no jurisdiction to make any inquiry as to possession, still less any final order unless and until he is satisfied of the likelihood of a breach of the peace, and that it is absolutely essential that the fact and the grounds of his being so satisfied should appear in his first order directing the issue of notice. The intention of the law is not to provide rough and ready way of righting wrong by enabling a Magistrate to exercise in a rude and summary fashion the functions of a Civil Court, but to prevent breaches of the peace likely to arise from disputes concerning tangible immoveable property.

ORDER.

These proceedings are clearly bad from beginning to end and must be set aside.

It appears that Mt. Paika Bai made some verbal complaint to the Deputy Commissioner, who thereupon sent her to the Tahsildar with an informal note, directing him to make a local inquiry and to make a full report, if he should find that any criminal offence had been committed.

The Tahsildar then held an inquiry and submitted a report.

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* This was a criminal revision by the Deputy Commissioner of Nagpur. The suit was originally decided by the Tahsildar of Nagpur.

The Deputy Commissioner after referring to certain mutation proceedings recorded an order nominally under Section 145 Code of Criminal Procedure. That order does not state that the Deputy Commissioner is satisfied that a dispute likely to cause a breach of the peace exists, still less the grounds of his being so satisfied. It refers to the mutation proceedings and sets forth that it is quite clear from the admission of Jagannath Singh "that he has not been in possession and Paika Bai has been." It does not state what is the property in question. It concludes with a direction that under Section 145 Code of Criminal Procedure notice issue to Paika Bai and Jagannath Singh to appear in the Deputy Commissioner's Court "to state their cases."

The notice which was issued in pursuance of that order was of the vaguest nature and was altogether irregular and insufficient.

Jagannath Singh was informed by it that "some investigation had to be made in respect of his estate and rights," that he should therefore appear in person or by pleader on the date fixed, and "if he had anything to urge in connection with his rights and estate he should put in a written statement."

Both parties appeared by Counsel. Jagannath Singh's Counsel handed in some rent receipts by way of proving his possession and disputed the accuracy of the Tahsildar's record of the statement made by Jagannath before him.

The Deputy Commissioner thereupon passed an order declaring that Paika Bai should remain in possession of all the immoveable property left by Govind

Singh and that Jagannath Singh and Rajaram be forbidden all disturbance of that possession until she should have been evicted.

It does not appear even from the final order of the Deputy Commissioner that he considered that there was any likelihood of a breach of the peace. I concur with the High Court of Calcutta in its long current of rulings that a Magistrate has no jurisdiction to make any inquiry as to possession, still less any final order, unless and until he is satisfied of the likelihood of a breach of the peace and that it is absolutely essential that the fact and the grounds of his being so satisfied should appear in his first order directing the issue of notice. The intention of the law is not to provide a rough and ready way of righting wrong by enabling a Magistrate to exercise in a rude and summary fashion the functions of a Civil Court; but to prevent breaches of the peace likely to arise from disputes concerning tangible immoveable property.

The proceedings of the Deputy Commissioner are set aside. There is nothing to prevent him from recommencing them in a legal and regular manner, if he thinks it necessary to do so. In that case he will have to take evidence and not to rely upon the Tahsildar's inquiry and report, which cannot in the circumstances in which they were ordered be regarded as an inquiry made under the provisions of Section 148 Code of Criminal Procedure.

Counsel for Applicant—Mr. Jivaji Kavasji Pleader.

Supplement to N. S. 31—8—1892.

APPELLATE CRIMINAL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Criminal Revision No. 313 of 1892.*

Decided on 20th July 1892.

Empress vs. Patiram.

An order summarily rejecting an appeal under the provisions of Section 421 of the Code of Criminal Procedure, does not amount to a judgment within the meaning of Section 424 and of the Chapter XXVI. A judgment under Section 424 of the Code implies a trial.

The essential difference between the rejection of an appeal under Section 421 and its dismissal under Section 423 is, that in the latter case the appeal is disposed of after trial, whereas in the former the Court by summarily rejecting it refuses to try it at all.

Every order, however, passed in the exercise of judicial discretion, should show on the face of it, the ground on which it is made.

ORDER.

This is an application for revision presented on behalf of an accused person whose appeal has been summarily rejected under the provisions of Section 421 of the Code of Criminal Procedure on the ground that the Appellate Court's judgment does not fulfil the requirements of Section 367 of that Code. It is urged that Section 421 must be read in connection with Sections 367 and 424. In support of the application is cited a case reported in I. L. R. 15 Bom. II.

The so-called "judgment" of the Appellate Court is as follows:—"Petition of appeal and record perused. The appeal is summarily rejected."

The first question is whether an order summarily rejecting an appeal under Section 421 of the Code of

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* This was a criminal revision from the order of the Assistant Sessions Judge Nerbada Division. The suit was originally tried by Mr. Kelkar Magistrate First Class of Chhindwara.

Criminal Procedure is a judgment within the meaning of Section 424 and of Chapter XXVI of the Code.

The ruling cited in support of the application is apparently not to the point, for it does not appear that the case in question had reference to the summary rejection of an appeal under Section 421. The Counsel who argued the case spoke of his client's appeal as having been "rejected," but on the face of the Magistrate's order, which is quoted in full in the judgment of the High Court, it appears that the appeal was "dismissed" and "the conviction and sentence confirmed." Moreover the final order of the High Court was for the "rehearing" of the appeal. There was no argument and no decision as to whether an order passed under Section 421 was a judgment within the meaning of Section 424.

There is, however, an Allahabad case which goes to support the contention of the applicant: the case of Queen Empress *vs.* Ramnarain and another reported in I. L. R. 8 All. 514. It is said in the judgment in that case "It is laid down in Section 367 Chapter XXVI of the Criminal Procedure Code that the judgment of a criminal Court of original jurisdiction 'shall contain the point or points for determination, the decision thereon, and the reasons for the decision;' and by Section 424 of the same Code—a Section in the same Chapter with Section 421 and only three Sections after it,—it is enacted that "the rules contained in Chapter XXVI as to the judgment of a criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court other than a High Court."

With great respect I must say that I am unable to assent to the reasoning that because Section 424 is only three Sections after Section 421 in the same Chapter, an order of summary rejection passed under the provisions of the latter Section is a judgment within the meaning of the former. Section 424 refers us to Chapter XXVI of the Code, from the very first Section of

which, that is Section 366, it appears that a judgment implies a trial. The Section begins with the words "The judgment *in every trial* in any criminal Court of original jurisdiction and the words "*during the trial*" occur later in the Section. Section 367, on which the present application is based, begins with the words "every such judgment," thus referring back to Section 366, so that the words must be taken to mean "every judgment *in a trial* in any criminal Court of original jurisdiction." Now it appears to me that the essential difference between the rejection of an appeal under Section 421 and its dismissal under Section 423 is that in the latter case the appeal is disposed of after trial, whereas in the former the Court by summarily rejecting it refuses to try it at all.

In this view I think that an order of summary rejection does not amount to a judgment and that Section 424 has no application to such an order.

At the same time I think that on general principle every order passed in the exercise of judicial discretion should show on the face of it the ground on which it is made, and when an appeal is summarily rejected, the order of rejection should state that it is made because no appeal lies, because the appeal is time barred, because on a perusal of the petition of appeal and the judgment (or the record, if it has been sent for) the appeal appears to be manifestly groundless, or as the case may be.

In the present case it appears that the order of rejection was passed after perusal of the petition of appeal and the record and it may fairly be inferred that it was passed because the appeal was considered groundless. As the present application has no reference to the merits of the case, I see no necessity to interfere.

The application is rejected.

Counsel for Accused—Mr. Dillon Barrister-at-law.

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APPELLATE CRIMINAL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Criminal Revision No. 174* *of* 1892.

Decided on 7th May 1892.

Empress vs. Rewa Ahir.

* *Under second para of Section* 123 *of the Criminal Procedure Code, when a Magistrate orders a person to give security for keeping the peace for a period exceeding one year, all that he could do is to "issue a warrant directing him to be detained in prison pending the orders of the Court of Session" and to send his proceedings to that Court. It is then the duty of the Sessions Court to pass its own order on the proceedings submitted to it, stating the period for which the Court required security to be given and the period for which the prisoner was to be imprisoned for failure to give such security.*

I see no reason to interfere with the orders which have been passed in this case, so far as the merits are concerned. I have at the same time to point out that as regards form they are entirely irregular. The Magistrate has sentenced the prisoner to two year's imprisonment in default of his finding security and the Sessions Judge has confirmed the order. All that the Magistrate could do under the second paragraph of Section 123, Code of Criminal Procedure was to "issue a warrant directing him to be detained in prison pending the orders of the Court of Session," and to send his proceedings to that Court. It was then the duty of of the Sessions Court to pass its own order on the proceedings submitted to it. That order if properly

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* This was a criminal revision from the order of Mr. H. C. Bose Magistrate 1st Class and Extra-Assistant Commissioner Jabalpur.

framed, would not "confirm" any order that had been previously made by the Magistrate, but would state the period for which the Court required security to be given and the period for which the prisoner was to be imprisoned for failure to give security. The former period might be longer or shorter than that originally fixed by the Magistrate or it might be the same; the period of imprisonment could only be fixed by the Court of Session.

I think that though the order of the Court of Sessions in this case confirming the Magistrate's order of imprisonment is bad in form, it may be taken as practically equivalent to an order of the Court itself directing the prisoner to be imprisoned and I therefore do not consider it necessary to interfere on the ground of the technical incorrectness of the order.

Application dismissed.

APPELLATE CRIMINAL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Criminal Appeal No. 112* *of* 1892.

Decided on 20th September 1892.

Empress vs. Kana Nat.

Presumption arising under Section 114 *of the Evidence Act from the possession of stolen property arises only when the possession is "soon after the theft." See illustration (a) of the section, and the case of Shaikh Ma, I. L. R.* 11 *Cal.* 160.

Possession of stolen cattle, a year and nine months after the theft, cannot be taken as affording sufficient ground for presuming that the person in whose possession they were proved to have been after the lapse of so long a time had committed theft.

The facts on which the Appellant has been convicted under Section 379 Indian Penal Code and sentenced to 6 year's rigorous imprisonment are that certain buffaloes belonging to the complainant were stolen in November 1888 by some person or persons unknown and that two of those buffaloes were sold in August 1890 by the Appellant and another person.

Now the presumption which arises under Section 114 of the Evidence Act from the possession of stolen property arises only when the possession is "soon after the theft" (see illustration (*a*) of the Section and the case of Shaikh Ma, I. L. R. 11 Cal. 160.) The question whether the possession is sufficiently recent to justify the presumption varies according to circumstances and especially according to the nature of the property; but

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* This was a criminal appeal from the order of the Deputy Commissioner Saugor.

I do not think that the possession of stolen cattle a year and nine months after the theft can be taken as affording sufficient ground for presuming that the person in whose possession they were proved to have been seen after the lapse of so long a time had committed the theft. I am therefore unable to uphold the present conviction.

I have to remark that a sentence of 6 year's imprisonment passed on a finding under Section 379 Indian Penal Code is on the face of it illegal, for 3 years is the longest term for which imprisonment can be awarded under the provisions of that Section. To support the sentence passed in this case the finding should have been "under Section 379 read with Section 75 of the Indian Penal Code." The charge was correctly drawn up so as to include Section 75 of the Code and the finding should have been in accordance with it.

The conviction is set aside.

APPELLATE CRIMINAL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Criminal Revision No. 407 of 1892.*

Decided on 24th September 1892.

Empress vs. Sheolalsing.

In this case the applicant was arrested under the proviso of Section 114 of the Code of Criminal Procedure. He applied to be released on bail, but the District Magistrate in whose Court the case was pending refused to pass an order for bail partly on the ground of expediency and partly because the appellant's pleader was unable to show any provision of the Code under which bail could be claimed. Held that under Section 496 of the Code of Criminal Procedure bail may be claimed as of right, not only by a person accused of a bailable offence, but by "any person other than a person accused of a non-bailable offence" who "is arrested or detained without warrant by an officer in charge of Police Station, or appears or is brought before a Court."

It is extremely unsafe to trust to a marginal note of a section as giving its full purport.

[*Supplement to N. S. 2—11—1892.*]

The Applicant was arrested under the proviso of Section 114 of the Code of Criminal Procedure. He applied to be released on bail; but the District Magistrate, in whose Court the case is at present pending, refused to pass an order for bail partly on the ground of expediency and partly because the Applicant's Pleader was unable to show any provision of the Code under which bail could be claimed.

Section 496 of the Code of Criminal Procedure

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* This was a criminal revision from the order of the District Magistrate of Nagpur.

provides clearly that bail may be claimed as of right not only by a person accused of a bailable offence (as the marginal note to the Section indicates) but by "*any "person other than a person accused of a non-bailable "offence*" who "is arrested or detained without warrant "by an officer in charge of a Police Station, or appears "or is brought before a Court." Apparently the Magistrate was misled by the marginal note; but it is extremely unsafe to trust to a marginal note as giving the full purport of the Section to which it relates.

As the Applicant is entitled to bail as a matter of right, it is unnecessary to consider the other reason given by the Magistrate for refusing it.

The Magistrate is directed to release the Applicant on reasonable and sufficient bail.

APPELLATE CRIMINAL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Criminal Revision No. 403* *of* 1892.

Decided on 24th September 1892.

Empress vs. Gangaram.

The accused in this case was convicted under Section 97 of Act XVIII of 1889, of keeping swine in insecure enclosures; and sentenced to pay a fine and alternative imprisonment. In addition to these sentences the Bench ordered "that the accused should take his swine outside the Municipal limits within five days and demolish his enclosures, and in case of failure to comply with these orders pay a fine of one Rupee per diem."

Held that the orders for the removal of the swine and demolition of the enclosures and in case of failure to comply with those orders, the accused should pay a daily fine, were illegal.

The accused has been convicted under Section 97

* This was a criminal revision from the order of the Bench Magistrates 2nd Class Barhanpur.

of Act XVIII of 1889 of keeping swine in insecure enclosures in disregard of orders which the Committee has given to prevent them from becoming a nuisance. In addition to passing a sentence of fine and alternative imprisonment on the accused the Bench has passed the following order:—"That he should take his swine out-"side the Municipal limits within five days and demolish "his enclosures and in case of failure to comply with "these orders pay a fine of one Rupee *per diem*."

Neither Section 97 nor any other provision contained in the Act authorises a Magistrate to pass such an order as that the accused should take his swine outside the Municipal limits and demolish his enclosures, while the provisions of Section 97 relating to the imposition of a daily fine for a continuing offence has reference to an offence already committed at the time when the conviction is had, and not to an offence which may possibly be committed after the conviction. Thus, if an accused person committed only on the 1st September an offence under Section 97, a Magistrate sitting on the 5th September could inflict only a fine which might extend to twenty Rupees; but if the accused were proved to have committed the offence on the 2nd and 3rd of September also, he would be liable for each of those days to an additional daily fine which might extend to five Rupees.

The order for the removal of the swine and the demolition of the enclosures is set aside as having been made without jurisdiction. The order that in case of failure to comply with that order the accused should pay a daily fine of one Rupee is also set aside as illegal.

APPELLATE CRIMINAL.*

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Criminal Revision No. 414 of 1892.

Decided on 4th October 1892.

Empress vs. Thuska.

The accused in this case was treated by the Magistrate as a juvenile offender and in place of sentencing him to three or four months' imprisonment and sending him to a reformatory for so short a period, he sentenced him to receive fifteen stripes on his back by way of school decipline and to pay a fine of Rs. 3.

Held that in the first place the Magistrate was mistaken in supposing that the accused could be detained at a reformatory only for the period of imprisonment to which he might be sentenced; secondly the Magistrate was in error in sentencing the accused to be flogged on his back; and thirdly, as under Section 5 of Act VI of 1864 the punishment of whipping is inflicted on a juvenile offender "in lieu of any other punishment to which he may for such offence be liable" under the Indian Penal Code, the sentence of fine in addition to whipping was illegal.

Several errors appear in the judgment and sentence of the Magistrate. He has treated the accused as a juvenile offender and observing that the offence which the accused has committed is deserving of only three or four months' imprisonment and it would be useless to send him to a reformatory for so short a period, he has sentenced him to receive 15 stripes on his back by way of school decipline and to pay a fine of Rs. 3.

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* This was a criminal revision from the order of the Honorary Magistrate 2nd Class of Rajimon.

In the first place the Magistrate was mistaken in supposing that the accused could be detained at a reformatory only for the period of imprisonment to which he might be sentenced. Section 7, Act V of 1876 provides that instead of undergoing the sentence of imprisonment which may be passed upon him a juvenile offender may be sent to a reformatory and be there detained for a period which shall be not less than two years and not more than seven years.

Secondly, the Magistrate was in error in sentencing the accused to be flogged on his back. This Court's Criminal Practice Circular F 8 A explains that what is meant by inflicting a whipping "in the way of school decipline" is inflicting it with that degree of severity which would ordinarily be used for school decipline, and not inflicting it on a part of the body other than that on which it would be inflicted in the case of an adult.

Thirdly, as under Section 5 of Act VI of 1864 the punishment of whipping is inflicted on a juvenile offender "in lieu of any other punishment to which he may for such offence be liable" under the Indian Penal Code, the sentence of fine in addition to whipping was illegal. The ruling of the Bombay Court in the case reported in I. L. R. 16 Bom. 357 with respect to Section 2 of Act VI of 1864 applies equally to Section 5.

The sentence of fine is set aside. The fine, if realised, or so much thereof as may have been realised, must be refunded.

[*Supplement to N. S.* 30—11—1892.]

APPELLATE CRIMINAL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Criminal Revision No. 377 of 1892.*

Decided on 8th September 1892.

Empress vs. Padam Sing.

The accused in this case took a child of about 4 years outside the village, stripped him of his ornaments and then when the child threatened to tell his mother beat him. Held that the offence committed was one of theft and not of robbery as defined in Section 390 of the Indian Penal Code.

There was, however, nothing to prevent the Magistrate from convicting the accused separately of the theft and of causing hurt under the provisions of Section 235, paragraph 1 of the Code of Criminal Procedure.

A sentence of imprisonment can not be added to that of whipping when it is the first offence committed by the accused, and when a sentence of whipping has been carried out, it can not, afterwards, be enhanced, because that would involve the execution of the sentence considered as a whole by two instalments, which would be illegal.

The case for the prosecution is that the accused took a child of about four years outside the village, stripped him of his ornaments and then, when the child threatened to tell his mother, beat him. The Extra-Assistant Commissioner who tried the case held that it was one of theft, not of robbery, and on the ground that as it was the accused's first offence, he should be leniently dealt with awarded a sentence of fifteen stripes.

The Deputy Commissioner has referred the case to this Court, considering the offence committed to have been that of robbery and the sentence to be altogether inadequate.

I am not prepared to differ from the Extra-Assistant Commissioner on the law of the case. The theft

* This was a criminal revision from the order of the Extra-Assistant Commissioner of Saugor.

had been already committed when the hurt was caused so that it cannot be said that the hurt was caused "in order to the committing of the theft" or "in committing the theft," nor, I think, can it be said that the hurt was caused in carrying away the property "*for that end.*" The offence does not therefore seem to me to amount to robbery as defined in Section 390 of the Indian Penal Code. The hurt seems to have been caused for the purpose of deterring the child from giving information against the accused and I think that so far as its connection with the theft is concerned it rests on the same footing as if it had been caused an hour late instead of immediately after the commission of the theft. There was, however, nothing to prevent the Extra-Assistant Commissioner from convicting the accused separately of the theft and the causing of hurt under the provisions of Section 235 paragraph one, of the Code of Criminal Procedure and there is now nothing to prevent the Deputy Commissioner from trying the accused or causing him to be tried for the hurt in accordance with the provisions of the 2nd paragraph of Section 403 of the Code.

With regard to the inadequacy of the sentence I am entirely at one with the Deputy Commissioner.

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I greatly regret that by passing a light sentence of whipping the Extra-Assistant Commissioner has put it out of my power to award a punishment of suitable severity. As it was the accused person's first offence, I cannot add a sentence of imprisonment to that of whipping and as the sentence of whipping passed by the Extra-Assistant Commissioner has been already carried out, I cannot enhance it as a sentence of whipping, because that would involve the execution of the sentence, considered as a whole by two instalments, which would be illegal.

Let the papers be returned.

APPELLATE CRIMINAL.

Before J. F. Stevens, Esquire, C. S.

Officiating Judicial Commissioner, C. P.

Criminal Revision No. 412 of 1892.*

Decided on 28th October 1892.

Empress vs. Mulchand Pemraj.

In this case a proclamation was issued under the provisions of Section 87 of the Code of Criminal Procedure requiring the attendance of the applicants on the 28th September 1891. They did not appear on that date and an order was then passed for the attachment of their property under Section 88 of Code. They appeared before the attachment was effected. Held that as the attachment of property made under Section 88 of the Code of Criminal Procedure is intended to enforce the attendance required by a proclamation issued under the preceding Section, it is illegal to wait till the period specified in the proclamation has expired and to order attachment because the proclamation has not been obeyed.

It appears that on the 22nd August 1891 a proclamation was issued under the provisions of Section 87 of the Code of Criminal Procedure requiring the attendance of the present applicants on the 28th September 1891. They did not appear on that date and an order was then passed for the attachment of their property under the provisions of Section 88 of the Code. They appeared before the attachment was effected. They afterwards applied for the release of the property; but their application was refused. It is unnecessary to notice the subsequent history of the case.

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* This was a criminal revision from the [illegible] in appeal by the Additional Sessions Judge Nerbada and Jabalpur Divisions. The suit was originally tried by the District Magistrate of Narsingpur.

It is clear from the concluding paragraph of Section 88 that attachment of property under that Section is intended to enforce the attendance required by a proclamation issued under the preceding Section, that is attendance within the time specified in that proclamation. It is therefore illegal to wait till the period specified in the proclamation has expired and to order attachment because that proclamation has not been obeyed. In the present case the Magistrate has gone even further and has refused to release an attachment which was not made till actually after the appearance of the persons concerned.

The order of attachment passed by the Magistrate is set aside and it is ordered that the property attached thereunder be forthwith released from attachment.

Counsel for prosecution—Mr. B. K. Bose, Government Advocate.

„ *for Defence—Mr. Durga Prasad, Pleader.*

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